IN THE SUPREME COURT OF FLORIDA

DONTAE MORRIS, :

Appellant, :

vs. : Case No. SC15-2395

STATE OF FLORIDA, :

Appellee. :

_____:

APPEAL FROM THE CIRCUIT COURT
IN AND FOR HILLSBOROUGH COUNTY
STATE OF FLORIDA

INITIAL BRIEF OF APPELLANT

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TENTH JUDICIAL CIRCUIT

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STATEMENT OF THE CASE

Appellant, DONTAE MORRIS, was charged in Hillsborough County with five counts of first-degree murder in four separate cases, arising from the homicides of David Curtis and Jeffrey Kocab; Derek Anderson (1/69-70); Harold Wright; and Rodney Jones. This appeal is from Morris' conviction and death sentence in the Derek Anderson case.

The last-filed case (Rodney Jones), in which the state was not seeking the death penalty, was tried first. The defense sought a change of venue due to massive prejudicial publicity, and after an abortive attempt to select a jury in Tampa, Judge William Fuente granted the motion to the extent that the jury was selected in Orlando and transported to Tampa, where the trial took place. Morris was convicted, sentenced to life imprisonment without possibility of parole, and his appeal in that case is pending in the Second District Court of Appeal (case no. 2D13-1971).

The next case tried was the homicide of police officers Curtis and Kocab. It was the understanding of all parties that the procedure in which the jury would be selected in Orlando and transported to Tampa for the trial was intended to apply to each of Morris' upcoming trials (see 12/9-10; 17/555), so - - without a separate motion for change of venue - - that procedure was again employed for the Curtis/Kocab trial. Morris was convicted, sentenced to death, and his appeal in that case is pending in this court (case no. SC14-1317).

The third case to be tried (and the subject of the instant appeal) was the Derek Anderson homicide. [All three trials were

before the same trial judge, and the lawyers on both sides were the same]. The state sought the death penalty based on a single aggravating factor; i.e. Morris' prior convictions (for crimes which occurred after the Anderson homicide) of the Rodney Jones and Curtis/Kocab homicides. This time the state filed what it termed a "MOTION FOR RECONSIDERATION OF DEFENDANT'S MOTION FOR CHANGE OF VENUE (CASE NUMBER 11-CF-[0]00896), THE COURT'S INTERIM ORDER (CHANGE OF VENUE), FINAL ORDER ON CHANGE OF VENUE (CASE NUMBER 11-CF-000896)" (5/845-50). After a hearing on April 22, 2015, in which the defense strenuously objected to the state's request (13/40-51; 5/996), Judge Fuente found that although the pretrial publicity "may again make it difficult, or possibly impossible, to select a fair and impartial jury in Hillsborough County, it is appropriate to allow the parties the opportunity to attempt to select such a jury in Hillsborough County before again requiring a change of venue" (5/996-97).

Jury selection commenced on July 20, 2015, and, over defense counsel's renewed objections and request for change of venue (16/416-14;17/557-64; 20/1186-87), a Hillsborough County jury was impaneled to try the case. [See Issue I infra]. Morris was convicted (6/1178; 28/1876); the jury recommended the death penalty by a vote of 10-2 (7/1248; 29/2059); and Judge Fuente imposed a death sentence, finding one aggravating factor - - the prior convictions for the later-occurring homicides - - to which he accorded great weight, and numerous nonstatutory mitigating factors. Ten of the mitigators were accorded moderate weight; these were based on evidence that Morris suffered from major depression with psychotic features; that he has borderline intel-

lectual functioning which can impair his judgment and impulse control; his family relationships, his acts of generosity, "the cumulative effects of the many negative and difficult factors" in his upbringing; and the failure of the juvenile justice system to provide proper assistance (8/1461-74).

[The state subsequently nolle prossed the Harold Wright homicide charge].

STATEMENT OF FACTS

Due to page limitations, the facts pertaining to each appellate issue are set forth in detail in the argument sections of this brief. Much of the evidence presented by the state in the first phase of the July 2015 jury trial is summarized as follows in the state's sentencing memorandum (with record page citations added by Morris' appellate counsel):

> On May 18, 2010, Derek Anderson, a twenty-one year old man, was walking home with a friend, Joe Anderson, when they noticed a white car following them. This was at approximately 11:20 p.m. The two friends parted ways at the entrance of the [Johnson]-Kenneth Court Apartment Complex located on 43rd Street just north of Hillsborough Avenue in the city of Tampa. Just before leaving his friend to walk back to his residence, [Joe] Anderson saw the white car drive by them very slowly and saw the occupants of the car looking at him and his friend. Before walking home, Joe Anderson watched Derek walk across the parking lot of the complex heading in the direction of the apartment where Derek lived with his mother. A short time later, Joe Anderson called Derek's mother's cell phone to check on Derek's well-being. Derek answered and appeared to be o.k., but then the call ended with static. Joe Anderson then called back to the same number and someone answered the phone and Joe heard screams and raised voices. Joe ended up running to Derek's apartment where he found police officers and residents of nearby apartments all around Derek's front door (21/1274-99). Tampa Police officers responded to the scene arriving at 11:31 p.m. and found the victim laying on the ground by the front door of his apartment. Lifesaving efforts were attempted at the scene and the victim was transported to Tampa General Hospital where he later died (21/1246-49, 1258-66, 1309-17, 1358, 1371-79, 1383; 25/1636-37). An autopsy

of the victim revealed that the cause of death was a gunshot wound to his back with the bullet perforating his heart, lungs and aorta. The wound path had an upward trajectory from the entrance wound to where the bullet was located in the victim's right side chest muscles (25/1636-37, 1643-62)

On June 30, 2010, Ashley Price went to the Tampa Police Department Headquarters and met with Detective Michael Kirlangitis. Ms. Price explained that she knew the defendant and that he would call her frequently and confide in her. The defendant spoke with her a couple of days after Derek Anderson's death and told her that he murdered the victim. Specifically, the defendant told her that he saw the victim walking into the apartment complex around midnight, that he followed the victim making sure to stay back behind the victim so that the victim would not see him, and that he shot the victim from the first floor as the victim was standing by his door on the second floor. The defendant also told her that he stood on a short wall, that was approximately knee height, when he shot the victim and that the victim immediately fell to the ground when he was shot. Ms. Price was also told by the defendant that the victim was on the phone when he shot him, that he made a grunting noise when he was shot and that he, the defendant, knows where to shoot someone to kill them. As far as why he killed the victim ,the defendant told Ms. Price that he had confronted the victim, earlier that same day, about selling marijuana in the apartment complex, which the defendant considered to be his "turf", and that the victim had stood up to him, telling him that he lived there and that he would sell "weed" where he wanted to. The defendant told Ms. Price that the victim also insulted one of the defendant's friends and that he and the victim almost came to blows but that the altercation was "broken up" by some third party (22/1479-1504). Photographs of the apartment building where Derek Anderson was shot show that there was, in fact, a short wall that was approximately the height of ones knees that runs along an area on the first floor directly below the victim's apartment and that there was a large rectangular open space in the middle of the second floor that would allow a person on the first floor to see the area around the front door of the victim's apartment (21/1254-58; 24/1609-14; see 9/1547-1601).

Cordelia Fisher, resident of the building next to the victim's apartment building, on the night of the murder, heard one gunshot at approximately 11:30 p.m. Ms. Fisher then looked out a window of her apartment, which faced the parking lot, and saw four black men run to a white car, get in the car and drive off towards the exit to the apartment complex on 43rd Street (21/1332-40).

On June 2, 2010, Detective Henry Duran of the Tampa Police Department Homicide Unit, placed a call to

813-751-9185 and spoke with the defendant who identified himself (24/1590-95, 1607-08). Cell phone records for this phone number revealed that on the date of the murder at the time of the shooting that this phone, the defendant's phone, was utilizing a cell phone tower located one third of a mile from the murder scene (25/1667-1712, 1712-43; see 10/1607-1797).

In November of 2011 while incarcerated in the Hillsborough County jail charged with the murder of the victim, the defendant was overheard by Hillsborough County Detention Deputy Ruben Clemente to say "I repent for killing" (24/1622-24). [See Issue II, infra]

Evidence was introduced via stipulation that on June 29, 2010 Morris had a firearm in his possession and discharged it twice (22/1420). Firearms examiner Yolanda Soto testified that the .38 caliber bullet recovered from the body of Derek Anderson and the two .38 caliber projectiles recovered after June 29 were fired from the same firearm (22/1454-55; see 21/1317-22, 1364-66; 22/1394-95, 1421-22, 1445-55, 1460, 1475; 24/1603-06). [The latter gunshots were the ones which killed Officers Curtis and Kocab, but the trial judge did not allow the prosecution to bring this out in the first phase of this trial].

The state also played to the jury an audiotape of a recorded phone call from the jail, in which - - at various times - - Morris, his stepbrother Dwayne Callaway, his cousin Javonte Dennard, Ashley Price, and Ashley's sister Tiffany Price, participated (23/1542-67; see 23/1522-40). The prosecutor, in his closing argument, replayed numerous excerpts from the audiotape and commented extensively (26/1803-16, 1823-24). [See Issue III, infra].

Both the state and the defense agreed that Ashley Price's credibility was of great importance. The prosecutor told the jury that there was no doubt that Ashley was the heart and soul of

the state's case (26/1784), and the "most critical witness in the case" (26/1815). The defense did not call any witnesses; rather the defense's position was that the circumstantial evidence did not prove guilt beyond a reasonable doubt (26/1761-71), and that Ashley Price - - a four-time convicted felon (22/1494-95) - - was not a credible witness (26/1771-82). Defense counsel pointed out that she had testified that Morris told her that he shot Derek Anderson in the stomach, while the autopsy showed that he'd been shot in the back (26/1777-78; see 22/1489; 25/1651-52, 1657-60). Counsel further contended that it was implausible, given the casual nature of their relationship, that Morris would have told Ashley Price what she claimed he told her (26/1781-82; see 22/1479-81, 1484, 1500-03).

SUMMARY OF THE ARGUMENT

[Issue I] Morris was deprived of his right to a fair trial and penalty phase when the judge granted the state's motion to reconsider the change of venue. Under the extreme and unusual circumstances of this case, voir dire examination was an exercise in futility, and was wholly inadequate to obviate the need for a change of venue. [Issue II] The judge committed harmful error in allowing the state to introduce a redacted version of a statement made by Morris while he was under medical observation at the jail, because there was no nexus shown between the statement and the charged offense. The error was compounded, in violation of Morris' Sixth and Fourteenth Amendment rights, when the judge excluded expert testimony offered by the defense (to challenge the reliability of the statement) explaining Morris'

mental condition at the time the statement was made. [Issue III] Morris' right to a fair trial was destroyed by the prosecutor's repeated improper comments which permeated his opening and closing statements to the jury. The combined effect of the objected-to and unobjected-to remarks - - which prominently consisted of the prosecutor's personal opinions of Morris' guilt, the credibility of Ashley Price (the key prosecution witness and "the heart and soul" (26/1784) of the state's case), and the meanings of the words used by Morris, his stepbrother and cousin, Ashley Price, and Ashley's sister during a recorded phone call from the jail; as well as burden-shifting comments and pejorative characterizations - - poisoned the trial proceedings and should not be countenanced. [Issue IV] The shocking dash cam video showing the murders of police officers David Curtis and Jeffrey Kocab became the focus of the penalty phase of Morris' trial for the Derek Anderson homicide. [The harmfulness of this error was exacerbated by the inability of the voir dire process to ascertain jurors' exposure to, reactions to, or opinions formed as a result of the media coverage of the Curtis/Kocab case]. It is entirely likely, in light of the combination of errors, that Morris' death sentence in the instant case is, for all intents and purposes, a third death sentence for the murder of the two police officers. [Issue V] The Derek Anderson case is not one of the most aggravated and least mitigated first degree murders. Morris' death sentence - - based solely on his prior convictions for later-occurring crimes - - is both disproportionate and violative of the Eighth Amendment. [Issue VI] Morris' death sentence, imposed under an unconstitutional statutory scheme, can-

not be upheld under any "harmless error' standard. He was entitled to a unanimous jury verdict. Here, two jurors voted for life imprisonment. The state cannot show beyond a reasonable doubt that the combination of Hurst errors could not have affected the verdict because the error is the verdict. This Court and the United States Supreme Court (among others) have recognized that the unanimity requirement has a profound - - and unquantifiable - - effect upon jury deliberations.

[ISSUE I] THE TAMPA BAY AREA WAS SATURATED WITH INFLAMMATORY MEDIA COVERAGE OF THE MURDERS OF POLICE OFFICERS CURTIS AND KOCAB; AND THE TRIAL COURT'S GRANTING OF THE STATE'S MOTION TO RECONSIDER HIS DECISION TO SELECT THE JURY (IN MORRIS' TRIAL FOR THE DEREK ANDERSON HOMICIDE) FROM OUTSIDE OF HILLSBOROUGH COUNTY - - COUPLED WITH THE INADEQUACY OF THE VOIR DIRE PROCESS UNDER THE CIRCUMSTANCES OF THIS CASE TO ENSURE MORRIS' RIGHT TO A FAIR AND IMPARTIAL JURY IN THE GUILT PHASE AND ESPECIALLY IN THE PENALTY PHASE - - REQUIRES REVERSAL OF HIS CONVICTION AND DEATH SENTENCE

A. Introduction

For clarity's sake, undersigned counsel will lead by saying that the problem here is not the pretrial publicity concerning the murder of the charged victim Derek Anderson, which was relatively minimal, which very few prospective jurors were familiar with, and which could readily have been addressed through the voir dire process. Rather, the problem is with the overwhelming and emotionally charged media coverage of the murders of police officers David Curtis and Jeffrey Kocab. Evidence of that crime was excluded from the guilt phase of Morris' trial for the Derek Anderson homicide because the judge understood that it would be so prejudicial that there would be no point in even having a trial; the outcome would be a foregone conclusion. However, the state was seeking the death penalty based solely on Morris' prior convictions for the later-occurring Curtis/Kocab homicides

(and the murder and attempted robbery of Rodney Jones). The Curtis/Kocab murders - - including a dash cam video showing the actual shooting and the preceding interactions between Morris and Officer Curtis during the traffic stop - - became the central feature of the penalty phase. [See Issue IV, infra]. As a result of the trial court's error in granting the state's motion to reconsider the change of venue - - coupled with the inadequacy of the voir dire process, under the unusual circumstances of this case, to ensure an impartial jury - - Morris' right to a fair trial, and especially his right to a fair penalty phase, was violated beyond repair.

The state's motion to reconsider the change of venue was largely based on the five year time gap between the 2010 crimes, the four-day manhunt, and the funeral for the slain officers, and the upcoming 2015 trial for the Derek Anderson homicide (5/846, 849-50; 13/47-48). The prosecutor noted that the media attention in Morris' cases, "while initially intense and widespread locally", never rose to the level of national notoriety (5/848). Therefore, while the Rodney Jones and Curtis/Kocab cases had been tried before juries selected from outside the Tampa Bay media market, and while the judge and counsel for both sides had been proceeding in the belief that an Orange County jury would be empaneled in the instant case as well, the prosecutor was of the opinion that the voir dire process could now result in the selection of an unbiased jury in Tampa (5/847; 13/48-49).

The prosecutor was wrong. As defense counsel pointed out in opposing the state's motion:

> The state alleges in its motion that somehow something has changed. I'll agree something has changed: It's

> gotten worse. We had two highly spectacular, heavily covered trials since then. We've had a deal death sentence. We have had all kinds of press conferences by the police chief calling for Mr. Morris' head. We've had family members, we've had memorial services, we've had fund raisers, we've had Facebook activity. We've had just all kinds of things.

(13/42)

If anything, there was more need for a non-Hillsborough County jury in this case then in the previous two trials. In the Rodney Jones case the state was not seeking the death penalty. Therefore, the voir dire method which was futile in the instant case could theoretically have worked in the Rodney Jones case; i.e., any prospective juror who associated the name Dontae Morris with the shooting of the police officers could be excused for cause, no questions asked. Since the Curtis/Kocab murders would not be mentioned in the guilt phase, and since there would be no penalty phase, the remaining jurors would hear nothing to trigger their memories. So unless jurors, subsequent to voir dire, spontaneously remembered the police officer shootings or unless they were exposed to outside information, it might be possible for them to remain impartial.

In the trial for Curtis/Kocab murders, on the other hand, the jury was obviously going to hear the evidence of the Curtis/Kocab murders. Therefore (unlike the Rodney Jones and Derek Anderson jurors) there would be no point in shielding them throughout voir dire from any mention of the Curtis/Kocab murders. Nor would it be necessary to automatically excuse for cause any juror who had prior knowledge of the police officers' murders. Instead, the voir dire examination by the state and defense would ascertain the degree of each juror's exposure to the

media coverage and community events, and would determine what information each juror knew about the case. Unless that knowledge related to powerfully prejudicial and inadmissible matters (in which case the juror could be excused without further questioning), jurors would then be asked if they had formed any opinions about guilt or penalty, and - - if so - - whether they could put aside those opinions and decide the case solely on the evidence presented in court. Jurors who could do so would remain eligible, while those who could not do so would be excludable for cause. Under those circumstances, the voir dire process could potentially obviate the need for a change of venue.

The instant case presents the worst of both worlds. The state was seeking the death penalty, and the Curtis/Kocab murders were ruled inadmissible in the guilt phase but would be prominently featured in the penalty phase. Therefore, prospective jurors could not be asked during voir dire if they knew about the murders of the police officers or if they had formed any opinions (much less whether they could put aside their opinions). Even the names David Curtis and Jeffrey Kocab could not be mentioned to jog their memories, because any juror whose memory <u>was</u> jogged would simultaneously be disqualified. Instead, jurors were only asked if they knew anything about Dontae Morris, Derek Anderson, or Cortnee Brantley. Any juror who made the association between those names and the police officer shootings or the manhunt was immediately excused, while jurors who did not make that connection remained. [Interestingly, no fewer than fifteen jurors who did not initially associate Morris' name with

the police shootings either made the connection spontaneously within the next day or two of voir dire, or were exposed to outside contact which reminded them. They, too, were then excused for cause with no further questioning].

Assuming that none of the jurors who were selected spontaneously remembered the police officer shootings during the guilt phase (and no juror responded affirmatively when asked by the judge if their memories had been refreshed by anything), then the time bomb was the penalty phase, when the prosecutor informed the jury that during a traffic stop on June 29, 2010 Dontae Morris murdered police officers David Curtis and Jeffrey Kocab (29/1939-41). If (as the prosecutor had argued in support of his motion to reconsider the change of venue) memories fade, memories can also come flooding back, especially when prompted. Given the pervasive media coverage of the police officer killings throughout the summer of 2010, and the community outrage at the crime and community support for the officers' families, jurors who after five years may have no longer remembered the name Dontae Morris during voir dire were very likely stunned when the connection was finally revealed; as in "Omigod, he's that guy!" Memories and emotional reactions would be further stoked when the prosecutor showed the jury the dash cam videotape of the officers' murders as they occurred (29/1961-69; State's Penalty Phase Exhibit B). And by then there was no opportunity to learn whether jurors who had been exposed to the publicity had formed fixed opinions or prejudgments which would impact or even control their decision whether to sentence the officers' killer to death for the murder of Derek Anderson. [The importance of this

is magnified by the fact that there were no aggravating factors arising from the Anderson murder itself; the only aggravator was Morris' convictions for the Curtis/Kocab and Jones homicides].

Judge Fuente should have adhered to his prior decision to select the jury outside of Hillsborough County. He erred in granting the state's motion to reconsider the change of venue; he erred in denying the defense's objections and renewed requests made during the jury selection proceedings; and voir dire examination was wholly inadequate to cure the problem. As a result Morris' constitutional right to fair and impartial jury was lost.

B. The Right to a Fair and Impartial Jury

The United States and Florida Constitutions guarantee the defendant in criminal cases the right to fair and impartial jury. Morgan v. Illinois, 504 U.S. 719, 726-27 (1992); Manning v. State, 378 So.2d 274, 277 (Fla. 1979). When a defendant's life is at stake, it is not requiring too much that the accused be tried in an atmosphere undisturbed by a huge wave of public passion. Manning, 378 So.2d at 278.

> A change of venue may sometimes inconvenience the State, yet we can see no way in which it can cause any real damage to it. On the other hand, granting a change of venue in a questionable case is certain to eliminate a possible error and to eliminate a costly retrial if it be determined that the venue should have been changed. More important is the fact that real impairment of the right of a defendant to trial by a fair and impartial jury can result from the failure to grant a change of venue.

Manning, 378 So.2d at 277.

For that reason, [e]very reasonable precaution should be taken to preserve "the defendant's right to a fair trial by an impartial jury" [378 So.2d at 277], and a change of venue should

be granted when the evidence reflects "that the community is so pervasively exposed to the circumstances of the incident that prejudice, bias, and preconceived opinions are the natural result" [378 So.2d at 276]. This Court in Manning recognized that "[t]he trial court may make that determination upon the basis of evidence presented prior to the commencement of the jury selection process . . . or may withhold making the determination until an attempt is made to obtain impartial jurors to try the cause". 378 So.2d at 266 (citations omitted).

In some instances a juror's exposure to pretrial publicity containing extremely damaging and inadmissible information (such as, for example, his or her knowledge of a confession which will not be introduced at trial) is so prejudicial that the person exposed to such information should not be allowed to serve on the jury even if he or she does not have a preformed opinion. Bolin v. State, 736 So.2d 1160, 1164-65 (Fla. 1999); Reilly v. State, 557 So.2d 1365, 1367 (Fla. 1990). Ordinarily, however, the test for juror impartiality is whether he or she can set aside any preformed opinion, bias, or prejudice and render a verdict based solely on the evidence presented at trial. Bolin, 736 So.2d at 1164; see, e.g., Bundy v. State, 471 So.2d 9, 20 (Fla. 1985); Hill v. State, 477 So.2d 553, 555-56 (Fla. 1985); Castro v. State, 644 So.2d 987, 990 (Fla. 1994); Pietri v. State, 644 So.2d 1347, 1352 (Fla. 1994); Rolling v. State, 695 So.2d 278, 285 (Fla. 1997); Teffeteller v. Dugger, 734 So.2d 1009, 1020 (Fla. 1999); Busby v. State, 894 So.2d 88, 95 (Fla.2004).

In a capital case, the importance of preserving the defendant's right to a fair and impartial jury is enhanced, as it impacts both the determination of guilt and the determination of penalty, and as the Eighth Amendment requires a heightened degree of reliability and procedural fairness in any decision whether to sentence a person to death. See, e.g., Allen v. Butterworth, 759 So.2d 52, 59 (Fla.2000), citing Woodson v. North Carolina, 428 U.S. 280, 305 (1976) (plurality opinion); Lockett v. Ohio, 438 U.S. 586, 604-05 (1978). As this Court recognized in Hill v. State, 477 So.2d at 556, "[i]t is exceedingly important for the trial court to ensure that a prospective juror who may be required to make a recommendation concerning the imposition of the death penalty does not possess a preconceived opinion or presumption concerning the appropriate punishment for the defendant in the particular case. A juror is not impartial when one side must overcome a preconceived opinion in order to prevail." See also Thomas v. State, 403 So.2d 371, 375-76 (Fla. 1981) (jurors with predispositions concerning sentencing in capital cases should be excused); State v. Koedatich, 548 A.2d 939, 968 (N.J. 1988) (". . . [I]t is imperative that the defendant in a capital case receive an impartial jury"). An important part of the right to an impartial jury is an adequate voir dire to identify unqualified jurors. Morgan v. Illinois, 504 U.S. at 729-30; Rosales-Lopez v. United States, 451 U.S. 182,188 (1981) (plurality opinion); Ellington v. State, 735 S.E.2d 736,752 (Ga.2012); State v. Jackson, 836 N.E.2d 1173,1191 (Ohio 2005); State v. Clark, 981 S.W.2d 143, 147 (Mo.1998).

C. The Pretrial Publicity

In his June 8, 2011 response to the defense's motion to set bond, the prosecutor asserted that Morris, after the fatal shootings of Officers Curtis and Kocab, "took flight to avoid capture and successfully evaded capture for four days, despite being the subject of the single largest manhunt in Tampa Bay area history" (2/260). The police officers' murders and the ensuing manhunt became the focus of massive local media coverage and community outrage. Judge Fuente was well aware of the nature and volume of the pretrial publicity when he granted the defense's motion to select a jury from outside of Hillsborough County in the first (Rodney Jones) trial; when he employed the same procedure (without a separate motion for change of venue having been filed) in the second (Officers Curtis and Kocab) trial; when he granted the state's motion to reconsider the change of venue in this third (Derek Anderson) trial; and when he denied the defense's renewed objections to selecting the jury for this trial in Hillsborough County. The following is a sampling of the print media coverage, which - - it can be assumed - - was less visceral than what was seen and heard in the electronic media coverage. [Citations to the record in this subsection are mainly from the reconstructed record Addition, volumes 1 and 2 (cited as A1 and A2) and from the supplemental record (SR1)].

The Tampa Tribune editorialized that the shootings of the officers during the traffic stop "showed the depths of human depravity" (A2/298) and were a "cowardly deed that sent the community into mourning" (A2/299).

The media agreed with the prosecutor's description of the single largest manhunt in Tampa Bay area history (A1/180-81, 184, 188,191-92,194-95; A2/207,211,250-51,265,274,295-96,298; SR1/113). The next four days' activity was described in the print media: "An intense manhunt closed it second day Wednesday with a bristling show of force. . . . [S]cores of officers with assault rifles, police dogs and an armored assault vehicle ringed an apartment complex on N. 43rd Street. The law enforcement turnout included police, sheriff's deputies, FBI agents, even the Border Patrol", as well as a SWAT team from Lakeland (A1/180-81). Morris spent those days "eluding hundreds of local, state, and federal officers who offered a $100,000 reward, pursued nearly 400 tips and combed east Tampa for him" (A1/184). The "command center that was at the heart of the manhunt [was] like a small city (A1/188):

> Generators purred day and night. Car engines idled. Assault rifle-toting officers reviewed databases, discussed strategy, explored new leads.
>
> More than 200 city officers, county deputies, state investigators and federal agents from 15 agencies came and went. They needed water. They needed to be fed. They needed to sleep, shower and rest.
>
> On Monday, the site was the parking lot of a company that auctions used cars. By dawn Tuesday, it was crowded with RV-like mobile command centers, police cruisers, unmarked cars and television news trucks.
>
> Up went big military-style green tents and small canopies like at an outdoor art show. They provided cover for laptop computers, briefing areas and chow lines. Everything officials needed, down to cell phone chargers, had to be right there.
>
> The first day, two men and a woman drove up with a few buckets of chicken and it continued: Cuban sandwiches. Pallets of bottled water. Meals from Outback Steakhouse, McDonald's, Moxie's Café Downtown, Moe's South-

> west Grill. Bottles of Monster energy drink and Red Bull.
>
> Police work without expecting a thank you, [Police chief Jane] Castor said, so "to see this outpouring of support is very moving."
>
> Inside the main command centers, 10 to 20 people from various agencies worked at any given time. There was little talk of rank and no sense of ego, Castor said. Many came in on their days off. The work was cathartic.
>
> "The officers, they just need to have that closure," Castor said. "They want to be a part of bringing Dontae Morris to justice."

(A1/188)

In an article entitled "Police 'Tightening the Loop' on Suspected Cop Killer", it was observed that officers were seen searching the water and boats along the Palm River as helicopters circled overhead (A1/190). The mayor and the police chief thanked the public for their "outpouring of love and support". Since the news broke of the officers' deaths, people had been stopping at the TPD fallen officer memorial to pay their respects, leave flowers, or say prayers. "I can tell you, it has moved even the most hardened police officers to tears" said Chief Castor (A1/191). Mayor Pam Iorio, "in front of a bank of television cameras "announced that the manhunt "is the No. 1 priority in the city of Tampa" and "the intensity that you see right now will not let up" (A1/193). The visible aspect of that intensity included "[t]wo hundred officers from seven agencies with dogs and guns and flashlights"; "[t]actical teams searching attics"; "[c]ops swarming cemeteries and abandoned buildings" (A1/193). In the inner-city neighborhood where it was believed Morris might be hiding, residents were evacuated while the police searched apartment buildings (A1/194-95). Chief Castor

urged forbearance; "If . . . we have to evacuate an apartment complex, if we have to block off a street, and people are inconvenienced, it is a small inconvenience when you take into account what we're trying to accomplish here", which was the capture of someone who killed two of our police officers and who has likely killed other people (A1/194-95). Morris' mug shots were placed on the FBI "most wanted" list, above a photo of Osama Bin Laden (A1/195).

A Police Benevolent Association official, in explaining the "huge" community response to subsequent fundraising efforts on behalf of Officers Curtis' and Kocab's families, said it was partly due to the fact that two officers were killed but also because of the four-day search for the suspect. "Everybody's lives were revolving around the manhunt for several days. They were living it, watching it on TV" (A2/274).

There was a great deal of emotionally charged media attention devoted to the slain officers' funerals, their families, their personal lives and ties to the community, and the community's outpouring of grief and support. The joint funeral for the two officers was attended by 5000 people including the Governor and his wife (A2/202). "The two wives, Sara Kocab and Kelly Curtis, were supposed to meet for the first time Saturday at a police squad party. Instead, they came together as widows" (A2/202).

David Curtis and Jeffrey Kocab were described as committed family men who "set an admirable example for all of us" (A2/299). Curtis was devoted to his wife Kelly and his four young sons, ranging in age from eight months to nine years

(A2/238,299; SR1/114,123). Kocab was equally devoted to his wife Sara and was eagerly anticipating fatherhood (A2/299). Sara Kocab was nine months pregnant at her husband's funeral (A2/202). Friends had recently thrown a baby shower for the couple; "'It's a girl!' streamed across the room filled with pink and blue balloons. The daddy to be sampled baby food" (A2/244) Three weeks after Officer Kocab's funeral the baby, who was to be named Lily Nicole, was stillborn (A2/202,238,246,299; SR1/114,123). "Her family dressed her in pink and laid her on a black t-shirt honoring Tampa's fallen officers. She was buried beside her dad" (A2/246).

Officers Curtis and Kocab were friends who "followed rules and pulled each other out of danger more than once"; they would have risen in the ranks of the police department if they'd had the chance (A2/203). They made an "odd duo". The slender, swift, energetic Kocab, nicknamed Taz, "would ping-pong across a scene, collecting facts, jumping fences, chasing bad guys" (A2/202, 238). Curtis, known as Spooner, "towered over him, a mountain of muscle with a mellow smile". Curtis "could - and did - wrestle with cattle. But one day he called Kocab for a backup. Kocab arrived to find his partner alone, freaking out. He had found a spider in his car. Kocab took care of it. And Squad 306 never let Curtis live it down" (A2/238, see 203).

The news coverage focused just as much on letting the public understand who the two men were off the job. David Curtis was a romantic and a family man; when he first met his wife - - then a waitress - - in college he would leave her $20 tips on $5 sandwiches. Now, a little over a month before Curtis' death "the

couple had watched 8-year old Sean celebrate his First Communion. As part of the Mass, the boys brought flowers to the Blessed Mother." A week later, on Mother's Day, a waterside family photograph was taken. "The day before he died, [Curtis] went outside and clipped Kelly four roses to cheer her up - one for each son." At the visitation, "one of Curtis' sons nibbled an Oreo over the casket, sprinkling crumbs inside. Curtis was a clean freak, said his father-in-law Chris Bowers, but he would have loved knowing the crumbs were there". (A2/203,238).

Jeffrey Kocab had a way with kids and everyone said he was going to be a great dad. According to his pastor, Kocab mentored the pastor's young son, "taking him on police adventures and bringing him toys - as long as he could have some too". Pastor Howell had watched him get down on the floor and play with GI Joes; he told Sara Kocab "I thank God for your husband". Last Christmas the mayor of Tampa had joked with Kocab that he looked too young to be a police officer. Kocab, a former actor, hoped to channel his skills into becoming an undercover detective (A2/202,238).

Police chief Jane Castor said that June 29, 2010, the day she had to tell Kelly Curtis and Sara Kocab that their husbands had been murdered, was the worst day of her life; if she "described it as horrible, you'd have to imagine how they'd describe it." "I knew that evil existed, but this incident brought to light the overwhelming goodness in our community. By watching Sara and Kelly I realized that, as humans, we have an incredible capacity to handle seemingly crushing events. And when I look at

the Curtis boys, I see that I never fully understood the 'life's not fair' speech I give my boys" (SR1/114).

"Unprecedented" was the word the Tampa Police Department used to describe the "outpouring of community support" for the families of the slain officers (A2/273). Police chief Castor said she had been deeply moved by the public response, which she characterized as "nothing short of overwhelming". A police spokeswoman said she'd never seen the community moved to hold so many fundraisers. "Almost every weekend, there's an event. We think it shows just how much the officers' deaths impacted the community" (A2/273). As of August 18, 2010, more than $300,000 had been collected. The weekend of August 14-15 alone there were two car shows, pasta fundraisers at three O'Brien's Irish Pub locations, and a day of concerts at Channelside. On August 17 locally famous radio host Bubba the Love Sponge Clem personally delivered each widow a $26,500 check from his foundation. Eight more fundraisers were planned, along with a golf tournament sponsored by the local Police Benevolent Association (A2/273-274). T-shirt sales collected $30,000, a paintball tournament (a favorite pastime of Jeffrey Kocab's) generated $13,000, and a concert hosted by a motorcycle club netted $26,000 (A2/274, See 238). A group founded by late New York Yankees owner George Steinbrenner offered to pay college costs for David Curtis' four children (A2/274,279).

Tributes continued long after that summer. The mothers of the two police officers had met each other in the hours after their sons were killed. Six months later, Sandy Kocab launched a nonprofit foundation to help the families of Florida's fallen

officers. Cindy Warren, Officer Curtis' mother, was helping behind the scenes. "Warren said she and Kocab feel driven to attend National Police Week and know other grieving families feel the same way" (SR1/123). In a ceremony held a year after their deaths, a half-mile stretch of road in the area of Tampa where the shooting occurred was renamed The Officer Jeffrey Kocab and Officer David L. Curtis Memorial Highway (SR1/101-02).

In March 2011, the dash cam video was shown for the first time to members of the media (although not released to the public). Bay News 9's Holly Gregory viewed the video and reported "I can tell you that watching these two Tampa police officers be killed on tape was an absolutely horrible thing to see" (SR1/93). But "[o]urs is a community that has demonstrated time and again that we care deeply when officers' lives are taken", Gregory said. "The public interest is high", and she viewed it as her duty as a member of the media to explain exactly how those officers were killed (SR1/94).

D. The State's Motion to Reconsider the Change of Venue

Of the four homicide cases with which Morris was charged, the last-filed case (Rodney Jones), in which the state was not seeking the death penalty, was the first to be tried. The defense sought a change of venue due to massive prejudicial media coverage (most of it focusing on the murders of Officers Curtis and Kocab), and after an abortive attempt to select a jury in Tampa, Judge Fuente granted the motion to the extent that an Orange County jury was selected in Orlando. The jury was then transported to Tampa, where the trial took place. (Supplemental

Record, Vol.1, p.34-128, 129-30; Vol.2, p.201-02; Reconstructed Record Addition, Vol.1, p.7-12, 175-99; Vol.2, p.201-335; see original record, 3/567-71; 5/845-46, 996; 12/9-11; 13/40-42; 17/555).

The next case tried was the homicide of police officers Curtis and Kocab. It was the understanding of all parties that the procedure in which the jury would be selected in Orlando and transported to Tampa for the trial was intended to apply to each of Morris' upcoming trials (see 12/9-10; 17/555), so - - without a separate motion for change of venue - - that procedure was again employed for the Curtis/Kocab trial.

The instant case, involving the homicide of Derek Anderson, was the third and last to be tried. The state sought the death penalty based on a single aggravating factor; i.e. Morris' prior convictions (for crimes which occurred after the Anderson homicide) of the Rodney Jones and Curtis/Kocab homicides. As with the Curtis/Kocab trial, counsel for both sides and Judge Fuente were all proceeding on the belief that the judge's change of venue ruling in the Rodney Jones case applied to all of Morris' cases. [As the prosecutor later explained to the trial judge immediately before jury selection commenced in Tampa, the reason why the medical examiner would not be available until Monday "is because back before The Court ruled on the motion to change - - I'm sorry, readdressing venue, I anticipated we would go to Orlando, pick the jury and then bring them here on Monday and start the trial". The judge pointed out "We are doing it here because of you", and the prosecutor said "I know, Your Honor. I appreciate that" (17/555)]. Seeking a different jury selection

procedure for the Anderson trial, the state filed what it termed a "MOTION FOR RECONSIDERATION OF DEFENDANT'S MOTION FOR CHANGE OF VENUE (CASE NUMBER 11-CF-[0]00896), THE COURT'S INTERIM ORDER (CHANGE OF VENUE), FINAL ORDER ON CHANGE OF VENUE (CASE NUMBER 11-CF-000896)" (5/845-50). In its motion the state asserted that the trial was set to begin on July 20, 2015, and "at that time over five (5) years will have elapsed since the latest offense date, subsequent four day manhunt for the defendant, and funeral for the slain officers. Additionally. . . it will have been almost twenty-one (21) months since the defendant's last trial concluded and 14 months since he was sentenced on that case" (5/846). According to the state, the media attention given to this case had "dissipated considerably" and had become "almost non-existent" since his May 30, 2014 sentencing for the Curtis/Kocab murders (5/846).

A hearing was held on April 22, 2015, in which the defense strenuously objected to the state's request (13/40-51; 5/996). Counsel stated:

> The State alleges in its motion that somehow something has changed. I'll agree something has changed: It's gotten worse. We have had two highly spectacular, heavily covered trials since then. We've had a dual death sentence. We have had all kinds of press conferences by the police chief calling for Mr. Morris' head. We've had family members, we've had memorial services, we've had fund raisers, we've had Facebook activity. We've had just all kinds of things.

(13/42)

Defense counsel represented that as long as he'd been trying cases "I have never had a case that has had this kind of intense coverage and permeation of a given market" (13/44), and that the Orlando jurors in Morris' previous two trials "[came]

from a completely different media market and were not exposed to that several-year repetitive exposure of all these factors" (13/45). Counsel urged the trial court to adhere to his prior ruling and to the procedure used successfully in the earlier trials:

> I must tell you in the strongest possible terms I can summon, Dontae Morris cannot get a fair and impartial jury in the Tampa Bay area, not because there's anything wrong with the folks in the Tampa Bay area but because this is the most - - this news story has saturated this market to such an extent that by the time it is rehearsed in the media leading up to the trial, those who had forgotten about it will remember it again. And those on who didn't know about it before will now know about it. . .
>
> So we would strongly urge you to allow us to pick the jury in Orlando as we did before, bring that jury here. And that we believe is the only way a fair and impartial jury can be obtained. And we think it will be a momentous issue on appeal if, given the history of this case, if the Court changes its ruling at this time.

(13/45-46)

The prosecutor countered that the current media coverage did not compare to the way it was before. "The officers' cases are clearly and were clearly the highest profile cases. The fact that two police officers were killed. You had their widows and their families. These cases were heavily covered. But since then, as I put in my motion, this case has barely garnered any attention" (13/47). Now, the prosecutor said, we are almost five years from the police shootings, the funeral of the officers, and the manhunt (13/47-48). He further argued that Florida is a very transient state; a lot of people move in and move out (13/48). Therefore, he urged the court to "allow this to go forward here in Tampa and at least give a try to get a panel" (13/48). The appellate issue, he said, "will resolve itself because if

we're able to impanel a group of jurors who have never heard of the case or don't have any preconceived notions about the case, then that speaks for itself on the record " (13/48-49). Morris' other cases, according to the prosecutor, posed no problem because "if the jurors know anything about his other cases, they're automatically eliminated in our due process issues" (13/49).

Defense counsel agreed with the prosecutor that the Curtis/Kocab case was the most sensational one, and pointed out that the state intended to introduce evidence pertaining to that case (13/50). Judge Fuente asked the prosecutor about that (13/51), and the prosecutor confirmed that it was his intention to introduce evidence of the Curtis/Kocab shooting (including the dash cam video and audio of the interaction between Morris and the two police officers leading up to and immediately before the shooting, although he offered to dim or turn off the video portion at the moment before the shots were fired), in order to put Morris in possession of a firearm, which would then be linked to both the Curtis/Kocab and Anderson homicides by the state's ballistics expert (13/51-80); see 5/851-60). [It was also clear that the state would introduce evidence of the murders of the police officers and of Rodney Jones in the event of a penalty phase, since the state had given notice that Morris' convictions of those later-occurring crimes was the sole aggravating factor the state was going to present (5/880). Later, during voir dire, right after defense counsel renewed his objection to selecting the jury in Tampa, the prosecutor announced

his intention to show the dash-cam video of the Curtis/Kocab murders in the penalty phase (16/417-18].

Judge Fuente declined to allow the state to introduce evidence of the police officers' murders in the guilt phase, on the ground that the "enormous" prejudicial effect outweighed any relevance; "Once this jury finds out that he killed two people, I mean, there's no sense having a trial. No sense at all." (13/61,64). He further stated "any judge has an obligation in 403 to allow a trial to proceed sensibly for God's sakes", and he couldn't imagine any verdict after than guilty if the jury heard about the other crimes (13/75).

The judge reserved ruling on the state's motion to reconsider the change of venue, expressing the concern that if an attempt to select a jury in Tampa were to prove unsuccessful, the trial "will be bumped into probably next year some time". In the meantime "we're lining things up in Orlando like we did before preliminarily in the event we have to do that" (13/51,80) On June 5, 2015, Judge Fuente entered a written order in which he found that although the pretrial publicity "may again make it difficult, or possibly impossible, to select a fair and impartial jury in Hillsborough County, it is appropriate to allow the parties the opportunity to attempt to select such a jury in Hillsborough County before again requiring a change of venue" (5/996-97)

E. Jury Selection

Jury selection commenced on July 20, 2015, and, over defense counsel's renewed objections and requests for change of venue (16/414-16;17/557-64; 20/1186-87), a Hillsborough County

jury was impaneled to try the case. At the outset, prospective jurors were informed that the indictment charged that the defendant Dontae Morris "unlawfully and feloniously killed someone by the name of Derek Anderson" with premeditation, by shooting him (14/134-35). They were also asked if they knew anything about a person named Cortnee Brantley (14/144). Based on this prompt, over forty percent of the jurors indicated prior knowledge. Those jurors were examined individually and asked what they knew. Every prospective juror who - - upon learning the names Dontae Morris, Derek Anderson, and Cortnee Brantley - - remembered the shooting of the police officers (including the very few who also remembered the Rodney Jones homicide) was immediately excused for cause. Since the trial court recognized that jurors' knowledge of the police killings would destroy the fairness of the trial and make the outcome a foregone conclusion, those prospective jurors were not asked whether they had formed any fixed opinions or whether they could decide the case solely upon the evidence presented at the trial. As soon as they mentioned the two officers they were gone. (14/158-61, 161-63, 163-66, 168-70, 170-72, 172-74, 174-76, 187-89, 201-03, 203-04, 204-06, 206-07, 207-09, 209-11, 211-12, 217-19, 219-22, 222-24, 224-26, 231-33, 233-34, 235-36, 236-38, 238-39, 242-45, 245-48, 248-49, 249-51, 251-53, 253-57, 257-59, 259-61, 261-63, 263-65, 270-71, 276-78, 278-80, 281-82; 15/286-89, 294-96, 298-300, 300-02, 306-10, 310-15, 316-18, 318-22, 327-29, 329-33, 333-37, 337-40, 351-53, 353-55, 355-57, 357-63, 363-65, 373-77, 377-79, 379-81, 381-85, 386-87, 394-96, 396-98, 404-06; 16/427-28, 428-30,

430-31, 431-33, 433-35, 435-37, 437-39, 439-41, 441-46; 17/568-69, 645-46; 18/720-22; 19/840-42, 842-43, 843-44,845).

Most of those jurors immediately associated the name Dontae Morris with the shooting of the police officers, but no fewer than fifteen jurors who did not initially make that association remembered it the next day or within a few days, either spontaneously or through conversations or new media coverage (16/421-27; see 16/427-28 [Davis]; 428-30 [Dixon]; 430-32 [Powell]; 431-33 [Glass]; 433-35 [McClinton]; 435-37 [Carnes]; 437-39 [Nickerson];439-41 [Leavitt];441-46 [Long]; 17/568-69, 645-46 [Perritt]; 18/720-22 [Perdomo]; 19/840-42 [Arrowsmith]; 842-43 [Brancasi]; 843-44 [Innocent]; 845 [Self]. Juror Nickerson, for example, did not initially recognize Morris' name, but later it kind of dawned on her; she now recalled not only that the police officers were shot, but also that the shooting was recorded on the dash cam (16/437-39).

Another fifteen jurors who recognized Morris' name from the media coverage but who didn't express any knowledge of the police officers' murders were not excused for cause (14/152-54, 154-58, 197-201, 213-17, 226-30, 265-70, 271-76; 15/289-94, 302-06, 322-26, 340-44, 344-51, 365-73, 388-90, 399-404). [A sixteenth juror in this category, Ms. Perritt, stated that upon hearing Morris' name she vaguely remembered a shooting but she didn't recall who was shot; "I just didn't want to say I hadn't heard of it and then all of a sudden I remember the details" (14/391-94). Two days later, she now recalled that it was an officer-involved shooting; "It's just something cause something's been nagging me from the very beginning" (17/568-69). That re-

covered memory resulted in her being excuse for cause (17/645-46)]. Juror Kinser did not remember who was killed, but he remembered the manhunt and the publicity surrounding it (15/289-94). Juror Cooper didn't recall specifics, but "[i]t must have been something pretty bad is all I can remember" (15/388-90). Juror Vanderipe had some images in his mind and believed Morris had dreadlocks; he didn't recall specifics but "I'm sure, you know, memory could be refreshed as evidence is presented" (15/322-26). Two of the people who recognized Morris' name from the publicity but didn't express knowledge of the police officers' murders - - Ms. Blunk and Mr. Naeher - - served on the jury (14/153-53; 266-30; 6/1150-51; 20/1191; 28/1876-77; 30/2203-05). Ms. Blunk described herself an "an avid news watcher" and she said the name Dontae Morris was "very, very familiar" to her, but "I don't remember the specifics any longer" (14/152-53).

During the jury selection proceeding defense counsel twice renewed his objection to the state's motion to reconsider the change of venue (16/416-17; 147/557-64). The prosecutor demurred: "[T]he whole reason for change of venue is because the publicity is so pervasive that you cannot seat a jury who doesn't have preconceived notions based on media coverage and we now have a panel who has no knowledge of the defendant's other cases. And we have already culled them down from that issue. That has been solved." (17/563). Judge Fuente recognized that he'd changed venue in the first two trials based on publicity but "my thinking [was] that pretrial publicity had died down'. "But I ruled the way I ruled. I'll abide by that ruling" (17/564). After the twelve jurors and the alternates were cho-

sen, defense counsel said "I do not need to tell you, we do not accept subject to our prior objections on the change of venue" and other related jury selection issues (20/1186). The judge said "Same rulings" and noted the objection (20/1187).

F. Morris' Right to an Impartial Jury was Irreparably Compromised

The prosecutor was wrong. We didn't "have a panel who has no knowledge of the defendant's other cases", nor, as far as can be known, did we have a panel of jurors with no preconceived opinions based on the media coverage. What we had - - at best - - was a panel of ten jurors who (after five years since the height of the publicity) didn't recognize Dontae Morris by name or face, and two others who knew the name or face but didn't remember why they knew it. The voir dire in this case could not obviate the reason for a change of venue because there was no opportunity to ascertain what the jurors knew or felt about the murders of police officers Curtis and Kocab, or what impact it would have on them once they found out that the defendant whose fate they were deciding was the person responsible for those notorious murders, or once they saw the dash cam video showing the murders taking place in real time. None of the 200-odd prospective jurors - - neither those who recognized Morris' name nor those who didn't - - were asked whether they had participated in any of the events and fundraisers held in the Tampa Bay community in the summer of 2010, continuing into the following year. Nobody was asked what information they had learned from the media, or how they were affected by the media portrayals of the officers' widows or families, or whether they would automatically vote to impose the death penalty on anyone who had killed a

police officer in general, or these police officers in particular. Nobody was asked whether they had formed any fixed opinions about the Curtis/Kocab murders, or whether they could put those opinions aside and base their verdict solely on the evidence presented in court. The large group of jurors who connected Morris' name with the police officers were not asked those crucial questions because there was no need to; and the even larger group of jurors who did not make that connection were not asked those crucial questions because to bring up the subject of the police officers would have tainted them for the guilt phase.

In Manning v. State, 378 So.2d at 276, this Court said, "A trial judge is bound to grant a motion for change of venue when the evidence . . . reflects that the community is so pervasively exposed to the circumstances of the incident that prejudice, bias, and preconceived opinions are the natural result. The trial judge may make that determination upon the basis of evidence presented prior to the commencement of the jury selection process, or may withhold making the determination until an attempt is made to obtain impartial jurors to try the cause". In Henyard v. State, 689 So.2d 239,245 (Fla.1996), the Court added, "Ordinarily, absent an extreme or unusual situation, the need to change venue should not be determined until or attempt is made to select a jury". Under the extreme and unusual circumstances of the instant trial for the homicide of Derek Anderson - - even more so than for the Rodney Jones trial and for the Curtis/Kocab trial itself - - trying to empanel an impartial jury in Hillsborough County was an exercise in futility. Judge Fuente had already protected Morris' constitutional right to a fair trial in

the Jones case and to a fair trial and penalty phase in the Curtis/Kocab case, without undue inconvenience to the state or anyone else, by selecting jurors from outside the Tampa Bay media market and transporting them to Tampa for trial. The judge and counsel for both sides understood that the same procedure would be employed for the Anderson trial, until the prosecution decided to ask the judge to reconsider, on the ground that the passage of time meant that an impartial jury could now be selected in Tampa. However, for the reasons discussed in this point on appeal, voir dire examination was wholly inadequate to assure the impartiality of the jurors or to dispel the need for change of venue. Morris' right to a fair trial, and especially his right to a fair penalty phase, before an impartial jury was irreparably compromised, and his conviction and death sentence must be reversed.

[ISSUE II] (1) THE TRIAL COURT ERRED IN ALLOWING THE PROSECUTION TO INTRODUCE A REDACTED STATEMENT ("I REPENT FOR KILLING"), MADE BY MORRIS WHILE HE WAS UNDER MEDICAL OBSERVATION AT THE JAIL, WHERE THERE WAS NO NEXUS SHOWN BETWEEN THE STATEMENT AND THE CHARGED OFFENSE; AND (2) THE TRIAL COURT'S RULING PRECLUDING THE DEFENSE FROM INTRODUCING THE EXPERT TESTIMONY OF DR. VALERIE MCCLAIN REGARDING MORRIS' MENTAL CONDITION AT THE TIME THE STATEMENT WAS MADE - - OFFERED TO CHALLENGE THE RELIABILITY OF THE STATEMENT - - VIOLATED MORRIS' SIXTH AND FOURTEENTH AMENDMENT RIGHTS AND DEPRIVED HIM OF A FAIR TRIAL

A. The Applicable Law (Crane v. Kentucky and the Constitutional Right to Present Evidence, Including Expert Testimony, Challenging the Reliability of a Confession or Inculpatory Statement)

A finding that a confession or inculpatory statement is involuntary requires evidence of coercive police conduct. Colorado v. Connelly, 479 U.S. 157 (1986). A finding that a confession or statement is unreliable does not. Crane v. Kentucky, 476 U.S.

683, 688 (1986) (because questions of credibility, whether of a witness or a confession, are for the jury, "the requirement that the court make a pretrial voluntariness determination does not undercut the defendant's traditional prerogative to challenge the confession's reliability during the course of the trial") (emphasis in opinion). Justice O'Connor, writing for a unanimous court in Crane, said "Indeed, stripped of the power to describe to the jury the circumstances that prompted his confession, the defendant is effectively disabled from answering the one question every rational juror needs answered: If the defendant is innocent, why did he previously admit his guilt?" 476 U.S. at 689; McIntosh v State, 532 So.2d 1129, 1130 (Fla. 4th DCA 1988) see also State v. Granskie, 77 A.3d 505, 508 and 509,n.3 (N.J. Super. 2013) (discussing McIntosh); State v. King, 904 A.2d 808, 817 (N.J. Super. 2006); State v. Buechler, 572 N.W. 2d 65, 72 (Neb.1998). "Accordingly, regardless of whether the defendant marshaled the same evidence earlier in support of an unsuccessful motion to suppress, and entirely independent of any question of voluntariness, a defendant's case may stand or fall on his ability to convince the jury that the manner in which the confession was obtained casts doubt on its credibility." Crane v. Kentucky, 476 U.S. at 689. Justice O'Connor emphasized that "[t]his simple insight is reflected in a federal statute [citation omitted] and the statutory and decisional law of virtually every State in the Nation" (citing, inter alia, Palmes v. State, 397 So.2d 648, 653, (Fla. 1981), which holds that the defendant's state of mind is relevant to the question, before the jury, of what weight to give to a confession in determining guilt).

For this reason, due process, procedural fairness, and the Sixth and Fourteenth Amendment right to a meaningful opportunity to present a complete defense prohibit the exclusion of "competent, reliable evidence bearing on the credibility of a confession when such evidence is central to a defendant's claim of innocence". Crane, 476 U.S. at 690.

As recognized in Crane, "the physical and psychological environment that yielded the confession can also be of substantial relevance to the ultimate factual issue of the defendant's guilt or innocence. Confessions, even those that have been found to be voluntary, are not conclusive of guilt. And, as with any other part of the prosecutor's case, a confession may be shown to be 'insufficiently corroborated on otherwise . . . unworthy of belief.'" 476 U.S. at 689 (quoting Lego v. Twomey, 404 U.S. 477, 485-86 (1972)) (emphasis supplied); see Kight v. State, 512 So. 2d 922,930 (Fla. 1987) (stating that Crane "held that testimony about the physical and psychological environment in which a confession was obtained is admissible by the defense to cast doubt on the statement's credibility"); see also Pritchett v. Commonwealth, 557 S.E.2d 205, 208 (Va.2002).

Florida case law - - both before and after Crane - - is consistent with its holding. As the Fourth DCA wrote in 2009 (relying on Palmes, which was cited with approval in Crane):

> In this case, the trial court erroneously concluded that Dr. Butts' testimony was irrelevant. A confession, which is the product of a confused mind or lack of mental capacity, "presents an issue of credibility for the jury to determine." DeConingh v. State, 433 So.2d 501, 503 (Fla. 1983). Thus, once a confession has been admitted,
>
> > the defendant is entitled to present to the jury evidence pertaining to the circumstances

> under which the confession was made. The reason for this rule is that it is the jury's function to determine the weight to be accorded the confession in determining guilt… The defendant's state of mind is relevant to this latter inquiry.
>
> Palmes v. State, 397 So. 2d 648, 653 (Fla. 1981). The trial court's determination that Dr. Butts' testimony was irrelevant overlooked appellant's entitlement to present such evidence and, accordingly, was error. [footnote omitted].

Dawson v. State, 20 So.3d 1016,1020 (Fla. 4th DCA 2009) (emphasis added in Dawson opinion).

Appellate courts in many other jurisdictions have held that expert psychiatric or psychological testimony concerning a defendant's mental condition is admissible to show that his or her confession or inculpatory statement is unreliable or unworthy of belief. See United States v. Shay, 57 F.3d 126, 128-34 (1st Cir 1995); State v. Granskie, 77 A.3d 505, 506-14 (N.J. Super. 2013); State v. King, 904 A.2d 808, 817-22 (N.J. Super. 2006); Pritchett v. Commonwealth, 557 S.E.205, 207-08 (Va.2002); Hollomon v. Commonwealth, 37 S.W. 3d 764, 767-68 (Ky. 2001); State v. Buechler, 572 N.W.2d 65, 71-74 (Neb. 1998); People v. Lopez, 946 P.2d 478, 482-83 (Colo. App 1997); Beagel v. State, 813 P.2d 699, 706-08 (Alaska Ct. App. 1991); People v. Hamilton,415 N.W.2d 653, 653-56 (Mich. App. 1987). [Each of these decisions, except for Shay and Beagel, expressly rely in part on the U.S. Supreme Court's decision in Crane].

Even before Crane [see Commonwealth v. Banuchi, 141 N.E.2d 835, 839 (Mass. 1957] - - and even long before Crane [see State v. Feltes, 1 N.W. 755, 760 (Iowa 1879), quoted by the Superior Court of New Jersey in State v. Granskie, 77 A.2d at 510, in support of its observation that "it is well established that a de-

fendant has the right to present expert psychological testimony bearing on the reliability of his confession"] - - the same principals were recognized.

Since coercive police conduct - - a prerequisite for determining that a statement was obtained involuntarily and is therefore inadmissible - - is not a prerequisite for a jury to weigh the credibility or reliability of a statement introduced by the prosecution [contrast Colorado v. Connelly with Crane v. Kentucky], the defendant's constitutional right to present expert testimony about his mental condition at the time of the statement does not depend on whether or not the statement was the product of interrogation. See United States v. Shay, 57 F.3d at 128-29 (statements made to reporters and cellmate, as well as a police officer); State v. Feltes, 1 NW at 757 and 760 (statement made to a Mrs. Squires, who was riding along the road near the defendant's farm). In Shay, a psychiatrist, Dr. Phillips, "was prepared to testify that [Shay] suffered from a mental disorder that caused him to make grandiose statements." The First Circuit Court of Appeals observed that "common understanding conforms to the notion that a person ordinarily does not make untruthful inculpatory statements", and that is why statements against interest are generally considered to be especially reliable. Dr. Phillips would have explained that, contrary to this common sense assumption, Shay's mental disorder caused him to make false statements "even though they were inconsistent with his apparent self-interest" 57 F.3d at 133. Therefore, the exclusion of the psychiatrist's testimony was reversible error, because it deprived Shay of the opportunity to show the jury that his statements "were the

unreliable product of a recognized mental disorder." 57 3d at 134.

B. The Trial Court's Rulings in the Instant Case

As with the change of venue issue, the procedural history of the issues involving the "I repent for killing" statement is complicated by the facts that Morris was charged in four separate cases (three of which ultimately went to trial); the cases had the same trial judge, the same prosecutor, and the same defense attorneys; and the issue was common to all the cases.

Dontae Morris was in jail under medical observation in November, 2011 when he made a series of statements which the state sought to introduce in each of his upcoming trials. As explained in the State's memorandum of law:

> The statements were made while the defendant was in a segregated cell and being observed by deputies who were working in shifts to allow for 24 hour observation of the defendant. The defendant was in this observation cell because of concerns that he may be suicidal and the observations were made to insure his safety. The observations lasted from 11/10/11 until 11/21/11. The deputies wrote notes as to their observations, including statements made by the defendant, in a "Direct Observation Log". There are 61 pages of notes contained in these logs which were provided to the defense in discovery on 12/29/2011. The State will not be moving to introduce the logs or notes themselves. The State will be seeking to introduce the testimony of Deputy Ruben Clemete as to observations he made of the defendant and especially certain statements made by the defendant on 11/15/11 between 6:53pm and 10:15pm.

(3/445)

In the first of Morris' cases to go to trial (homicide of Rodney Jones) the state had sought to introduce the following statements:

"He understands why people hate him. God is good. I'm not confused anymore and I know why people don't like me. Justice has to come, I understand"

"I repent for my sins to God. I accept you God and repent for all I have done. I repent for killing 5 people" (Note: the State will restrict the underlined testimony to the following: "I repent for killing.")

"I am going to heaven, I have repented" (said statements made while the defendant was kneeling at the door of the cell)

"I have accepted Jesus Christ"
(again, statement made while kneeling)

"Jesus is the way, the truth and the life and no one comes to the father [ex]cept through him"

"Jesus died on the cross, shed his blood for my sins, was buried and rose again on the third day, if you believe this you shall be saved"

(3/446)

The defense submitted the jail observation log (SR 133-36, 139-200) as an attachment to the untitled motion in limine which it filed in case no.11-CF-000896 (Rodney Jones homicide) on December 21, 2012 (SR 131-32). [According to defense counsel, he subsequently amended the motion to include all four case numbers (3/530), and, while the copy of the motion in the record does not reflect that change, the state's memorandum of law filed the day before the hearing does include all four case numbers (3/445-47)]. At the outset of the hearing on the motion in limine, on January 25, 2013, defense counsel stated:

It is the intention of the defense not to relitigate the same matter which I believe would apply with equal force to all four cases currently pending because of the nature of the alleged admissions documented by Deputy Sheriff Ruben Clemente. It's our intention to address those with respect to all case numbers to make the Court's ruling on the matter and the law of the case with respect to all current pending matters, sir.

(3/530)

During that hearing, Colonel James Previtera, the commander in charge of the Falkenburg Road Jail, testified that he'd been informed by the deputy commander that Dontae Morris was expressing to detention deputies that he believed that the guards were going to kill him (3/545-46). Colonel Privetera had also had a conversation with defense counsel in which he was told that Morris' family were concerned because he was making irrational statements indicating delusions and hallucinations (3/548-49). Privetera, from his prior contacts with Morris, thought these behaviors were uncharacteristic of him (3/550). He ordered that Morris "be placed on direct observation and that our psychiatric staff be contacted" (3/546). Deputies were assigned to sit outside Morris' cell, in a rotating 24-hour coverage ("continuous, around the clock uninterrupted until the status has changed by the psychiatric staff'), and document what they saw or heard (3/546-47)

The trial judge took the motion under advisement (3/566), and on February 20, 2013 entered a written order in case no. 11-CF-00896 in which he determined that five of the six statements had a purely religious context and were not relevant to the charged crime (SR 203-04). However, he ruled that the statement "I repent for killing 5 people" was relevant and admissible, provided that the reference to 5 people be omitted, which would - - as the state proposed - - redact the statement to say "I repent for killing" (SR 204-05; 3/446). The order "is rendered without prejudice to further considering the admissibility of any such statement in any of Morris' other pending homicide charges" (SR 205).

The day after the above order was signed (and the day before it was filed), the state took the deposition of Dr. Valerie McClain. (3/454-526; see 3/450-52), which led to a series of motions for reconsideration. Defense counsel objected strenuously and repeatedly, on multiple evidentiary grounds and state and federal constitutional grounds, to both the redacted "I repent for killing" statement, and to the trial court's subsequent rulings excluding from the jury trial the expert testimony of Dr. McClain - - a psychologist who had interviewed Dontae Morris and had reviewed the Hospital Duty/Direct Observation Log (in which the detention deputies had recorded in detail their observations of every aspect of Morris' behavior from November 10-21, 2011) - - regarding Morris' mental condition at the time the statement was made on the night of November 15, 2011 (see 3/450-52, 530-37, 565-66, 573-77; 5/884-88, 921-22, 938-61; SR 2-16, 21-23, 131-21). The defense specifically contended in its memorandum of law (citing Crane v. Kentucky) that the exclusion of Dr. McClain's testimony would violate Morris' Sixth and Fourteenth Amendment right to present evidence challenging the reliability of the statement made while he was under medical observation in jail (5/954-60).

Nevertheless, the sum of the trial court's rulings on these matters was that the prosecution could introduce the redacted "I repent for killing" statement, while the defense could not present Dr. McClain's testimony regarding Morris' mental condition at the time the statement was made (5/914-16; 6/1005-07, 1104-08; SR 203-05, 206-10). In his July 8, 2015 order (specifically with regard to the instant case) Judge Fuente stated that he had "read

and considered Dr. McClain's February 2013 deposition and diagnosis of Mr. Morris, wherein she opines that at the time he uttered the words at issue he was suffering from major depression with psychotic features, hence his statements are not reliable, and [the court] has further considered defense counsel's well-reasoned memorandum of law" (6/1105). Judge Fuente "perceived that the proposed statement that he repents for (and admits to) killing five people to be relevant to material issues the jury must decide" but - - having reviewed Dr. McClain's findings of Mr. Morris' mental state - - he "did not perceive that [Morris'] described emotional state at the time he uttered these words rendered them unreliable, given the specificity of what he said in some of the statements with respect to the several offenses with which he was charged" (6/1106) (emphasis supplied). Because Morris' statement constituted an admission (as opposed to a spontaneous statement made while perceiving the event), Judge Fuente concluded "that his mental state at the time he uttered the statement is not relevant; and that to allow evidence of such would confuse issues" (6/1106). He wrote:

> Expert or lay opinion evidence of an accused's mental state, whether proposed by the defense or by the State, is not relevant or admissible absent evidence of the affirmative defense of insanity at the time of the offense. Mental state evidence at the time an accused utters a statement or admission after or before the charged offense is not relevant to demonstrate the reliability or credibility of such statement or admission. Such an assessment is for the jury.

(6/1107; see also SR 208)

At trial, immediately before detention deputy Ruben Clemente testified that he heard Morris say "I repent for killing" (24/1623), defense counsel renewed all of his previously litigated

motions and objections regarding the statement, including the exclusion of expert testimony (24/1620). The prosecutor, in his closing statement to the jury, argued:

> [Morris is] arrested July 2, 2010. Months later he's sitting in Hillsborough County Jail charged with capital murder of Derek Anderson and he looks at Reuben Clemente from four feet and says, I repent for killing. He admits to killing sitting there charged with a capital murder. That evidence, in and of itself, is proof beyond and to the exclusion of all reasonable doubt. There is no doubt in this case who the murderer of Derek Anderson was. It was this defendant sitting here.

(26/1817) (emphasis supplied).

C. The Circumstances Surrounding the "I Repent for Killing" Statement

As discussed earlier, a defendant must be allowed to present to the jury evidence bearing on the physical and psychological environment which yielded his confession or inculpatory statement, so that the jury can decide whether the statement is reliable and can determine what weight to give it. Crane v. Kentucky; Palmes v. State, 397 So.2d at 653; Dawson v. State, 20 So.3d at 1020; McIntosh v. State, 532 So.2d 1129, 1130 (Fla. 4th DCA 1988); State v. Granskie, 77 A.3d at 51, n.3 (discussing McIntosh). As this Court recognized in Palmes, the defendant's state of mind is relevant to that inquiry.

Dr. Valerie McClain is a forensic psychologist who saw Dontae Morris on three occasions in 2012. On the first visit, on January 19, 2012, she conducted a structured forensic interview, which included "his developmental background, family structure, education, occupation, any substance abuse issues, mental health

history, and a mental status exam" (3/463, see 457-79). She also reviewed Morris' jail medical records, and the Hospital Duty/ Direct Observation Log in which correctional officers made a detailed record of Morris' behavior from November 10, 2011 through November 21, 2011 (3/459, 494-500). Dr. McClain's opinion - - based in equal part on the forensic interview and the jail observation notes during the period of time when he was on suicide watch - - was that Morris was experiencing a very severe depression with psychotic features (3/495-96, 498, 518, 520).

The prosecutor asked Dr. McClain whether there is anything, in and of itself, which suggests mental illness when a person is talking about repenting their sins and accepting Jesus as their savior, "[b]ecause that appears to be directly out of the gospels of Jesus Christ" (3/502). Dr. McClain agreed that in a different context such statements "would be considered rather normal" (3/504), but where the person is under psychological observation as a danger to himself or others:

> - - where he's noted to be agitated and pacing and the theme of what he's talking about is basically self-deprecation, of being accused, accusing himself and saying he's a child molester, he understands why people hate him, it's persecutory. In other words, it goes beyond just a pow-wow of, "I'm coming clean with something," to I think it's delusional or psychotic - -
>
> Mr. HARMON [prosecutor]: All right.
>
> Dr. MCCLAIN: - - and I think there's a difference between a repentant state, you know, that's of a rational mind as opposed to someone who's under observations in a psych unit.

(3/505)

On cross-examination by defense counsel, Dr. McClain agreed that having strongly held spiritual beliefs does not rule out severe mental illness; "obviously you can have both"(3/521).

From what she was able to discern from the jailers' notes, Morris was probably psychotic at the time of their observations (3/520).

The direct observation notes begin on the night of November 10, 2011, when Morris was placed in a restraint chair and was evaluated by Dr. Kurz (SR139). He was removed from the restraint chair nearly three hours later; Nurse Smith noted no injuries (SR 139). He was placed back in his cell in a suicide gown (SR 139). During the ensuing week-and-a-half, Morris was constantly pacing in his cell; he was also observed singing, talking to himself, picking at his nails and feet, and twisting his hair and his beard (SR 139-200). The first night he said "Just rape me and put me back in my cell, like nothing ever happened" (SR 140). While pacing, he continued talking to himself about Heaven and how God had told him earlier that day to change his ways, and it was at that time that he'd accepted Jesus (SR 140-41). That morning he asked the guard "Are you guys going to kill me?" According to the notes "I assured him that will not happen. Morris seems to think that 'we' are waiting for him to fall asleep so 'we' can harm him" (SR 142). Morris repeated that somebody had said that the guards were going to rape him and kill him (SR 142). He asked to go back to his old cell, and was told by the guard that medical needed to make that decision (SR 142).

At around 11:00 a.m., when another deputy assumed the observation detail, Morris said "Please don't do to Inm[ate] Watkins what you guys are about to do to me. Watkins is too old for this shit" (SR 143). That afternoon, after praying on his bunk, Morris was saying that voices were telling him he has AIDS (SR

143). He paced in his cell for hours, talking to himself and to God, and he appeared agitated (SR 144). He refused the evening meal (SR 144). During the time frame when he was on medical observation, Morris refused many meals (SR 141, 143, 144, 154, 155, 157, 164, 169), claiming his food was laced with drugs (SR 155), or it was too cold (SA 169), or that he couldn't eat because the guards were about to rape him (SR 157, 181).

The entry for November 12 opens with "NEW DAY!! I/M Morris is still pacing in cell" (SR 152). After a couple of hours of pacing, mumbling quietly to himself, and singing or rapping to himself, Morris began talking to the guard at the window, telling him "the Voodoo has been trying to kill me", but that he loves God anyway and God is in control (SR 152). Continuing to pace, Morris was repeating certain phrases like "The devil is a liar", "Cast out all the demons Lord God", and "I rebuke the Voodoo in Jesus' name" (SR 153). He said it was his little brother who "put Voodoo on him to die and go to Hell" (SR 153). His little brother was trying to have him killed (SR 155), and deputies were trying to kill him (SR 153). He kept talking about religion and how the world was out to get him (SR 153). A deputy and a nurse offered him medication, which he refused (SR 154).

Morris said he was responsible for giving his whole bloodline AIDS, even though he doesn't have AIDS (SR 154). While staring at his arms, he said he was being sacrificed so his family can live (SR 154). He is described in the observation notes as "acting paranoid", and he "says the voices told him that every shift is going to rape him till he kills himself" (SR 155)

On November 13, 2011, according to the notes, Morris - - described as very agitated - - states "I shot the white guy cause my girl Teressa put something on me" (SR 165). Later that night, while talking to himself, he mentioned the name Dred as if that were the name of the person he was talking to (SR 168).

A little after 4:00 p.m. on November 15, Morris began to speak of repenting for his sins, and said "I'm not scared, my physical form fears the worst because my central nervous system but my soul is not scared" (SR 176). After 8:00 he said he was a "young buck child molester" and he understood why people hate him (SR 177) (slightly more legible copy at SR 136). God is good, he [Morris] is not confused any more, justice has to come, and he repents for all he has done (SR 177, 136; see 3/445). At 8:35 he made the statement, "I repent for killing 5 people" (SR 177, 136; see 3/446). Around twenty minutes later Morris was saying "Jesus is here. Jesus is coming to get me. I appreciate it. I appreciate it. I appreciate it" (SR 178). He continued making religious statements about Jesus and being saved for the next hour and ten minutes (SR 178; see 3/446).

The next morning, Ms. Best from Psych came in to evaluate Morris (SR 180). The notation for 10:24 a.m. reads, "Using right hand in form of a gun. 2 shots to the right & 4 shots to the left. Continues pacing" (SR 180). Nurse Brown (also from Psych) came in for a well-being check (SR 180). At around 3:00 p.m., after another shift change, Morris was observed mumbling incoherently to himself and repeatedly flailing his arms and legs (SR 180). When he stopped flailing, he was looking at the wall and stating that they are still sending the evil spirits at him;

he keeps shaking them off and they keep sending them (SR 181). When yet another detention deputy took over, Morris said "Hey, Dep. I'm dead so why am I here?" (SR 182).

The last entry in the log (9:20 a.m. on November 21) reads "Notified I/M removed from dir. obs. Placed on psych obs. No sharps" (SR 200).

D. The Redacted "I Repent for Killing" Statement was Insufficiently Linked to the Charged Homicide of Derek Anderson to be Admissible

Judge Fuente, in his May 6, 2015 order on the defense's motion to reconsider the prior motion in limine, said "The Court perceives that the proposed statement where [Morris] repents for (and admits to) killing 5 people is relevant [to] the material issue the jury must decide, and does not perceive that his emotional state at the time he uttered these statements renders them unreliable, given the specificity of what he says in some of the statements with respect to the offenses with which he is charged" (5/915) (emphasis supplied)

What specificity? The unredacted "I repent for killing 5 people" statement contains no identification of the five people he is referring to, and absolutely no detail about the killings from which identity could be inferred. The surrounding statements made on the night of November 15, 2011 were religious ramblings (made by a person whose bizarre behavior was meticulously documented by jail guards, who was on suicide watch, and who, in Dr. McClain's opinion, was actively psychotic) which shed no light on what Morris was talking about when he said "I repent for killing 5 people". While it is convenient for the State to

assume that he must have meant the five homicides which the State was prosecuting him for, that is all it is - - an assumption.

The redacted statement - - "I repent for killing" - - is even more vague, and it does not necessarily indicate that Morris killed Derek Anderson, only that he killed someone, or (even more prejudicially) that he kills people. As defense counsel contended below (3/450-52, 530-36, 565-66; 5/884-88; SR 5-6 (1) the statement was not relevant to the charged crime; (2) it strongly implied a general propensity to kill; and (3) its unfairly prejudicial impact far outweighed its tenuous probative value. See Lee v. State, 737 So.2d 1116 (Fla. 2d DCA 1999); see also People v. Durr, 604 N.Y.S. 2d 385 (1993). Its introduction into evidence was reversible error.

E. The Exclusion of Dr. McClain's Expert Testimony - - Offered to Challenge the Reliability of the "I Repent for Killing" Statement - - Violated Morris' Sixth and Fourteenth Amendment Rights and The United States Supreme Court's Holding in Crane v. Kentucky

Assuming arguendo that the "I repent for killing" statement was properly put into evidence before the jury, then it was for the jury - - not the trial judge - - to determine from all of the surrounding circumstances, including the accused's mental condition, whether the statement was reliable, and to decide what weight to give it. Crane v. Kentucky, 476 U.S. at 684-92; Palmes v. State, 397 So.2d at 653. Under the constitutional principles of Crane, expert testimony concerning a defendant's mental condition is admissible to show that his or her confession or inculpatory statement is unreliable or unworthy of belief. See Shay; Granskie; King; Pritchett; Holloman; Buechler;

Lopez; Beagel; Hamilton. Otherwise, as the United States Supreme Court recognized in Crane, "the defendant is effectively disabled from answering the one question every rational juror needs answered: If [he] is innocent, why did he previously admit his guilt?" 476 U.S. at 689.

In the instant case (again, assuming arguendo that the "I repent for killing" statement could be taken as an admission of guilt of the murder of Derek Anderson), the defense wanted the jury to consider the possibility that Morris made the statement not because he was guilty but because he was crazy. Dr. McClain's expert opinion that Morris, at the time of the statement, was experiencing a very severe depression which "went into psychotic features of a break with reality" (3/495-96) would have put his vague statement "I repent for killing" into context, and would have allowed the jury to fairly decide (1) whether the statement was reliable or unreliable, (2) whether they could confidently believe it had anything to do with the murder of Derek Anderson, and (3) what weight, if any, they should accord it. The opportunity to present such evidence to the jury is what Crane v. Kentucky requires.

The trial court, noting that he had "considered arguments and authorities in defense counsel's memorandum on the questions of whether expert opinion psychological testimony regarding the reliability of such statements" (6/1107), reached the following erroneous conclusion:

> Expert or lay opinion evidence of an accused's mental state, whether proposed by the defense or by the State, is not relevant or admissible absent evidence of the affirmative defense of insanity at the time of the offense. Mental state evidence at the time an accused utters a statement or admission after or before the

> charged offense is not relevant to demonstrate the reliability or credibility of such statement or admission. Such an assessment is for the jury.

(6/1107)

The trial court's ruling is inconsistent with the U.S. Supreme Court's decision in Crane; inconsistent with this Court's decision in Palmes; and 180 degrees contradictory to the aforementioned cases from Virginia, Kentucky, Nebraska, Colorado, Alaska, Michigan, Massachusetts, Iowa, and the federal First Circuit, all of which hold that evidence - - including expert testimony - - concerning a defendant's mental condition at the time he utters a confession or inculpatory statement is relevant and admissible to challenge the reliability or credibility of the statement.

The fact that diminished capacity is not a defense to a criminal charge in Florida (see the trial court's comment at SR 208-09), and that therefore, absent an insanity defense, expert psychiatric or psychological testimony is ordinarily inadmissible when offered to prove the defendant's mental condition at the time of the crime [see, e.g., Chestnut v. State, 538 So.2d 820 (Fla.1989], is entirely beside the point. Morris' defense in the instant case was that he did not commit the crime, so his mental condition at the time of the crime is irrelevant. What is at issue is his mental condition at the time he made the statement which was redacted into "I repent for killing". The controlling decision is Crane, not Chestnut, and the erroneous exclusion of Dr. McClain's testimony violated Morris' Sixth and Fourteenth Amendment rights and deprived him of a fair trial.

F. Harmful Error

As a result of the trial court's rulings which hamstrung the defense's ability to explain to the jury Morris mental condition at the time of the statement, the prosecutor was able to portray the redacted statement as being conclusive of guilt:

> [Morris is] arrested July 2, 2010. Months later he's sitting in the Hillsborough County Jail charged with capital murder of Derek Anderson and he looks at Reuben Clemente from four feet and says, I repent for killing. He admits to killing sitting there charged with a capital murder. That evidence, in and of itself, is proof beyond and to the exclusion of all reasonable doubt. There is no doubt in this case who the murderer of Derek Anderson was. It was this defendant sitting right here.

(26/1817) (emphasis supplied)

Where, as here, an evidentiary error deprives a defendant of a right guaranteed by the United States Constitution, the standard for whether the error can be deemed "harmless" is that of Chapman v. California, 386 U.S. 18 (1967). As this Court said in State v DiGuilio, 491 So.2d 1129,1135 (Fla. 1986)"[t]he harmless error test, as set forth in Chapman and progeny, places the burden on the State, as beneficiary of the error, to prove beyond a reasonable doubt that the error complained of did not contribute to the verdict or, alternatively stated, that there is no reasonable possibility that the error contributed to the conviction".

> The test is not a sufficiency-of-the-evidence, a correct result, a not clearly wrong, a substantial evidence, a more probable than not, a clear and convincing, or even an overwhelming evidence test. Harmless error is not a device for the appellate court to substitute itself for the trier-of-fact by simply weighing the evidence. The focus is on the effect of the error on the trier-of-fact.

State v. DiGuilio, 491 So.2d at 1139

In Florida, the DiGuilio framework applies to both non-constitutional errors (such as the introduction of the "I repent for killing" statement) and constitutional errors (such as the exclusion of Dr. McClain's testimony which would have enabled the defense to challenge the reliability of the statement). See Goodwin v. State, 751 So.2d 537 (Fla. 1999) The importance of proper application of the DiGuilio test has been repeatedly emphasized by this Court. See Goodwin, 751 So.2d at 540-42; State v. Lee, 531 So.2d 133 (Fla. 1988); Ventura v. State, 29 So.3d 1086, 1089-91 (Fla.2010); Cooper v.State, 43 So.3d 42 (Fla. 2010); Jackson v. State, 107 So.3d 328, 342-44 (Fla.2012)

In the instant case, the fact that the "I repent for killing" statement could have played a role in the jurors' deliberations and contributed to their verdict is amply illustrated by the prosecutor's closing argument, in which he went much further than urging them to consider the statement as circumstantial evidence of guilt; he actually went so far as to tell them that -- "in and of itself" - - Morris' jailhouse "admis[ssion] to killing sitting there charged with a capital murder" constituted proof of his guilt beyond and to the exclusion of all reasonable doubt (26/1817).

First of all, the prosecutor exaggerated the impact of the statement. "I repent for killing" - - or even "I repent for killing 5 people" - - is not a confession to the murder of Derek Anderson, nor does the statement contain any details which indicate that it referred to the murder of Derek Anderson. A confession or admission "which is consistent with facts other than the crime for which the defendant is accused" is circumstantial, not

direct, evidence. Williams v. State, 774 So.2d 931,933-34 (Fla. 5th DCA 2001), citing Thorp v. State, 777 So.2d 385,389-90 (Fla. 2000). "One that is too vague to link a defendant to a crime is insufficient, by itself, upon which to base a conviction". Williams, 774 So.2d at 934; see E.M. v. State, 441 So.2d 1155 (Fla 3d DCA 1983). [Contrast Francois v. State, 65 So.3d 632,633-35 (Fla 4th DCA 2011), in which the defendant - - on trial for burglary and attempted robbery - - had made admissions to the witness McKinney that he had tried to break into a check cashing store located on Sunrise Boulevard; that he used a 12-gauge shotgun to break the window; and that he threw the shotgun into the bushes when he took off. The appellate court found that even though the defendant did not indicate the date of the burglary, the details were sufficiently specific and sufficiently corroborated to link him to the charged crime, so the trial judge properly denied his motion for judgment of acquittal].

The state might try to argue that it didn't need the "I repent for killing" statement because it had Ashley Price's testimony that Morris had called her and told her all about the Derek Anderson homicide. First of all, if the trial prosecutor didn't think the "I repent for killing" statement would have any impact on the jury's decision, he wouldn't have battled successfully to (1) introduce it and (2) exclude Dr. McClain's testimony which the defense would have introduced to challenge the statement's reliability. If the prosecutor didn't think it would play any role in the jury's deliberations or contribute to its verdict, he certainly wouldn't have argued that the statement was, in and of itself, proof of Morris' guilt to the exclusion of all rea-

sonable doubt. See Gunn v. State, 78 Fla.599, 83 So.511 (1919); Farnell v. State, 214 So.2d 753,764 (Fla. 2d DCA 1968) ("who can say that the [errors complained of] . . . did not and could not have had the effect that the state's attorney intended"); see also Stoll v. State, 762 So.2d 870, 878 (Fla. 2000) (prejudice Stoll suffered as a result of inflammatory hearsay statements being improperly admitted "was exacerbated by the State's reliance on this evidence during closing arguments"); Robinson v. State, 982 So.2d 1260, 1262-63 (Fla. 1st DCA 2008) (prosecutor's emphasis on the erroneously admitted evidence bespeaks a reasonable possibility that the error affected the verdict).

In State v. Buechler, 572 N.W.2d 65,71-74 (Neb. 1998), the issue was whether the trial court abused his discretion by excluding a psychologist's expert testimony concerning Buechler's mental state when he made a recorded confession while incarcerated. Citing, inter alia, Crane v. Kentucky and United States v. Shay, supra 57 F. 3d at 133, the Nebraska Supreme Court determined that the trial court's ruling was erroneous and that the error was not harmless beyond a reasonable doubt. "While three [other] witnesses testified that Buechler confessed killing the victim to them, the jury could well have questioned their credibility." 527 N.W.2d at 73.

In the instant case, Ashley Price's credibility - - or lack thereof - - was the most vigorously disputed aspect of the trial. (Compare the prosecutor's closing argument at 26/1784-85, 1788-91, 1803-17, 1822-24, with defense counsel's closing argument at 26/1764, 1771-82). Ashley Price was a four-time convicted felon (22/1494-95, 1500; see 26/1772, 1782) who - - despite

the casual nature of her acquaintance with Morris [they had sexual relations one time but he wasn't really her type, and she didn't know much about his personal life] - - claimed that he called her frequently on the telephone and told her things that were confidential, including a detailed narrative of the murder of Derek Anderson (22/1480, 1483-94, 1502-03; see 26/1781-82). According to Ashley Price, Derek Anderson was on the second floor walkway of the apartment complex, and Morris stood on a little knee-high wall on the bottom floor, took aim, and fired (22/1487-89).

> MR. HARMON [prosecutor]: What did he say about that?
>
> ASHLEY PRICE: That he shot him in his stomach.
>
> MR. HILEMAN [defense counsel]: I [c]ouldn't hear you ma'am.
>
> ASHLEY PRICE: That he shot him in his stomach
>
> MR. HARMON: Okay. Did he make any statements to you about his knowledge of what place to shoot somebody to kill them?
>
> ASHLEY PRICE: Yes.
>
> MR. HARMON: What did he say about that?
>
> ASHLEY PRICE: He knows where to shoot someone in order to kill them.

(22/1489)

Problem is that Derek Anderson was shot in the back. There was an entrance gunshot wound in the back and there was no exit wound; the trajectory of the bullet went from back to front, left to right, and upward. The projectile terminated in the right pectoral muscle of the chest (25/1651-52, 1657-60; see 26/1777-78). The prosecutor tried to sweep this major inconsistency under the rug with speculation:

> Who wants to tell someone he shot someone in the back? How brave and courageous does that sound? It is too far-fetched to believe that he would change that part of this courageous story of how he eliminated his competition in the Johnson Kenneth Court Apartments?

(26/1790)

That's one possibility. Another possibility - - strongly argued by the defense - - was that Ashley Price was lying and couldn't get her story straight.

Another aspect of Ashley Price's credibility which was very much contested in this trial is the meaning of Morris' March 4, 2011 recorded phone conversations from the jail with his step-brother (also referred to in the record as his half-brother) Dwayne Calloway, his cousin Javonte Dennard, Ashley Price, and Ashley's sister Tiffany Price (23/1531-68; 26/1778-81, 1803-17, 1823-24). Plainly, Morris was upset that Ashley Price was talking to the police, but his words were susceptible of two interpretations; was he upset (as he stated to Callaway and Dennard) because she was lying and he wanted her to tell the truth? Or was he upset (as the prosecutor insisted, crossing the line into expressing his personal opinions on guilt and credibility, see Issue III, infra) because she was telling the truth and he wanted her to lie?

In any event, Ashley Price's credibility was vigorously challenged at trial, while - - as a result of the trial court's ruling excluding Dr. McClain's testimony concerning Morris' mental condition - - the defense's ability to challenge the reliability of the "I repent for killing" statement was severely hamstrung. The jury may have disbelieved Ashley Price (or had serious doubts about her believability), yet convicted Morris based

on the "I repent for killing" statement coupled with circumstantial evidence. See DiGuilio, 491 So.2d at 1136; State v. Buechler, 572 N.W.2d at 73-74. This Court cannot determine beyond a reasonable doubt that the introduction of that statement - - and, even more importantly, the erroneous exclusion of powerful defense evidence showing the circumstances under which that statement was made [Crane v. Kentucky] - - could not have played a role in the jury's deliberations or contributed to its verdict. Morris' conviction and death sentence must be reversed for a new trial.

[ISSUE III] MORRIS WAS DEPRIVED OF A FAIR TRIAL BY PROSECUTORIAL MISCONDUCT WHICH PERMEATED HIS OPENING AND CLOSING STATEMENTS

A. Introduction

"A criminal trial is a neutral arena wherein both sides place evidence for the jury's consideration; the role of counsel in closing argument is to assist the jury in analyzing that evidence, not to obscure the jury's view with personal opinion, emotion, and non-record evidence." Ruiz v. State, 743 So.2d 1, 4 (Fla. 1999); Cardona v. State, 185 So.3d 514,520(Fla. 2016). The A.B.A. Standards for Criminal Justice 3-5.8(b) caution that in closing argument to the jury "the prosecutor should not express his or her personal belief or opinion as to the truth or falsity of any testimony or evidence or the guilt of the defendant. The Commentary to this Standard explains:

> The prosecutor's argument is likely to have significant persuasive force with the jury. Accordingly, the scope of argument must be consistent with the evidence and marked by the fairness that should characterize all of the prosecutor's conduct. Prosecutorial conduct in argument is a matter of special concern because of the possibility that the jury will give special

> weight to the prosecutor's arguments, not only because of the prestige associated with the prosecutor's office, but also because of the fact-finding facilities presumably available to the office.

See Ruiz, 743 So.2d at 4, and Cardona, 185 So.2d at 520 (each quoting Hall v. United States, 419 F. 2d 582,583-84 (5th Cir. 1969).

A prosecutor's obligation, as representative of the State, is not just to win a conviction or death sentence, but to ensure that justice be done; ". . . while he may strike hard blows, he is not at liberty to strike foul ones." Craig v. State, 685 So.2d 1224,1229 (Fla. 1996), quoting Berger v. United States, 295 U.S. 78,88 (1935). As this Court observed in Craig, the "rules of conduct . . . recognize that our adversary system of justice has its limitations in the prosecution of criminal cases, and especially capital cases." 685 So.2d at 1229.

As the prosecutor in the instant case enthusiastically acknowledged, the state's key witness against Morris was Ashley Price. The first thing he said to the jury in his rebuttal closing argument (after having given an extremely brief initial closing argument, 26/1759-61) is "Ashley Price is the heart of the State's case. She is the heart and soul of this case much there's no doubt about that. She is" (26/1784). [See also 26/1815-16, where he refers to Ms. Price as the most critical witness in the case]. During the course of his argument to the jury, Mr. Harmon repeatedly expressed his personal opinions that Ashley Price was credible, that Morris was guilty, and that Morris had tried to intimidate her. When he played excerpts from Morris' recorded phone conversations from the jail with Dwayne Callaway, Javonte Dennard, Tiffany Price, and Ashley Price - -

conversation thick with a street slang and inflection with which most if not all of the jurors would likely be unfamiliar - - Mr. Harmon provided them with his own interpretation of what was said and what was meant. He also shifted the burden of proof regarding witness credibility; he insinuated that he had personal knowledge of Morris' drug dealing activity far beyond what was in evidence; and he indulged in repeated name-calling in his opening statement to stigmatize Morris before any evidence was even presented.

The Florida Bar's Rules of Professional Conduct 4-3.4(e) clearly and unequivocally state that a lawyer must not:

> in trial, state a personal opinion about the credibility of a witness unless the statement is authorized by current rule or case law, allude to any matter that the lawyer does not reasonably believe is relevant or that will not be supported by admissible evidence, assert personal knowledge of facts in issue except when testifying as a witness, or state a personal opinion as to the justness of a cause, the culpability of a civil litigant, or the guilt or innocence of an accused[.]

In this case, Assistant State Attorney Harmon violated nearly every aspect of this rule, and he did so again and again and again. The drumbeat of improper comments became the overwhelming feature of his argument to the jury, and it deprived Morris of his right to a fair trial.

B. Pretrial Motion to Preclude Improper Argument

Before trial the defense filed a motion to preclude improper argument and tactics (4/781-96). The state did not respond, and the trial court found that "[t]he matters set forth in the motion are well-taken . . ." (6/1018). He granted the motion to the extent of prohibiting the state from engaging in twenty-five

enumerated types of improper argument, including (b) and (o) the prosecutor expressing his personal belief that the defendant is guilty, or his opinion on the credibility of a witness; (f) arguing facts not in evidence; and (h) making vituperative characterizations of the defendant (6/1018; see 4/782-83, 789-90). In granting the motion, Judge Fuente commented, "It goes without saying however that this prosecutor has not even, and does not, cross the line regarding the concerns set forth in this motion" (6/1019).

C. Evaluating the Cumulative Effect of Objected-to and Unobjected-to Prosecutorial Comments

Three of the prosecutor's improper remarks before the jury in the instant case were objected to; the remainder were not. The prosecutor's burden-shifting comment suggesting that the defense had the burden of proving Ashley Price's motive to fabricate [see Bell v. State, 108 So.3d 693,648-49 [Fla. 2013] and one of the more egregious examples of the prosecutor improperly bolstering Ms. Price's testimony were objected to; the earlier objection was ignored and the prosecutor continued in the same burden-shifting vein (26/1784-85), while the latter objection was overruled (and therefore was preserved; see, e.g., Simpson v. State, 418 So.2d 984,986 (Fla. 1982); Robinson v. State, 989 So. 2d 747,750(Fla. 2d DCA 2008)) (26/1816). Defense counsel also objected and unsuccessfully requested a curative instruction when the prosecutor told the jury in his opening statement that Ms. Price (whose 2015 trial testimony was later impeached by her four felony convictions) had never been convicted of a felony at the time she spoke with the police in 2010 (21/1229-31).

In cases of prosecutorial misconduct, Florida appellate courts consider "the cumulative effect of objected-to and unobjected-to comments when reviewing whether a defendant received a fair trial". Merck v. State, 975 So.2d 1054,1061 (Fla. 2007); see Ruiz v. State, supra, 743 So.2d at 7; Pope v. Wainwright, 496 So.2d 798,801 and n. 1 (Fla. 1986); Crew v. State, 146 So. 3d 101,108 (Fla. 5th DCA 2014); Lewis v. State, 780 So.2d 125, 128-29 (Fla. 3d DCA 2001); Pollard v. State, 444 So.2d 561,563 (Fla. 2d DCA 1984).

D. Fundamental Error

Moreover, when a prosecuting attorney's misconduct "in its collective import is so extensive that its influence pervades the trial", the doctrine of fundamental error comes into play, and reversal for a new trial may be warranted even in the absence of any objection below. Sempier v. State, 907 So.2d 1227 (Fla. 5th DCA 2005); see, e.g. Caraballo v. State, 762 So.2d 542 (Fla. 5th DCA 2000); Cochran v. State, 711 So.2d 1159,1162-64 (Fla. 4th DCA 1998); Pacifico v. State, 642 So.2d 1178 (Fla. 1st DCA 1994); Ryan v. State, 457 So.2d 1084 (Fla. 4th DCA 1984); Jones v. State, 449 So.2d 313 (Fla. 5th DCA 1984). See also Henry v. State, 743 So.2d 52,54-55 (Fla. 5th DCA 1999) (Harris, J., concurring and concurring specially).

E. Repeated Epithets in Opening Statement

"The purpose of an opening statement is for counsel to outline the facts expected to be proved at trial. It is not the appropriate place for argument." First v. State, 696 So.2d 1357, 1358 (Fla. 2d DCA 1997). If name-calling and pejorative characterizations of a defendant are improper in a prosecutor's clos-

ing argument [see, e.g. Gore v. State, 719 So.2d 1197,1201 (Fla. 1998); Pacifico v. State, 642 So.2d at 1182-83], then it follows that such comments intended to predispose the jury against the accused are even more inappropriate and prejudical in an opening statement, before the jury has heard any evidence. As the Supreme Courts of Pennsylvania and Connecticut have recognized:

> It is no part of a district attorney's duty, and it is not his right, to stigmatize a defendant. He has a right to argue that the evidence proves the defendant guilty as charged in the indictment, but for the district attorney himself to characterize the defendant as a 'cold blooded killer' is something quite different. No man on trial for murder can be officially characterized as a murderer or as a 'cold blooded killer,' until he is adjudicated guilty of murder or pleads guilty to that charge.

Commonwealth v. Capalla, 185 A. 203,206 Pa. 1936); see Commonwealth v. Gilman, 368 A.2d 253,258 (Pa. 1977); State v. Couture, 482 A.2d 300,317-18 (Conn. 1984) (each quoting Capalla).

The Pennsylvania Supreme Court perceived that the prosecutor's characterization of the defendant as a "cold blooded killer" amounted to an expression of his personal belief in the defendant's guilt; such epithets "have no legitimate place in a district attorney's argument". Capalla, 185 A. at 206. Moreover, "the first officials who had the right to give expression to that belief were the jurors after the case was committed to their keeping". 185 A.2d at 206.

Florida appellate courts, including this Court in Urbin v. State, 741 So.2d 411. 420 n.9 (Fla. 1998), have also recognized that it is improper for a prosecutor to refer to the defendant as a "cold-blooded killer" or a "ruthless killer". See also Henry v. State, 743 So.2d 52,53 (Fla.5th DCA 1999).

In the instant case, the prosecutor's use of such epithets to predispose the jury against Morris and to undermine his constitutionally guaranteed presumption of innocence was far from an isolated slip-up; rather, it was the theme of his opening statement and he hammered it home repeatedly. See Brooks v. State, 762 So.2d 879,900 (Fla. 2000); and contrast Lugo v. State, 845 So.2d 74,107 (Fla. 2003). Mr. Harmon described Morris as a "stone cold killer" (21/1222, 1223), a "ruthless killer" (21/1222, 1223), a "cold blooded killer" (21/1224, 1226), and -- doubling down - - a "ruthless stone cold killer" (21/1224) no fewer than seven times in his opening statement. Then, in his very brief (one and a half pages) initial closing argument he repeated both the "ruthless killer" and "stone cold killer" remarks (26/1760). The final remark was juxtaposed with an appeal to the jurors' sympathies and emotions: "And there is no doubt whatsoever, none that this defendant is that stone-cold killer that took this 21-year-old man just like that. Took him from his mom, his sisters, and from his little boy" (26/1760) (emphasis supplied). See Bertolotti v. State, 476 So.2d 130,134 (Fla. 1985) ("The proper exercise of closing argument is to review the evidence and to explicate those inferences which may reasonably be drawn from the evidence. Conversely, it 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"). See, e.g. Servis v. State, 855 So.2d 1190, 1197 (Fla.5th DCA 2003); Gomez v.State, 415 So.2d 822 (Fla. 3d DCA 1982).

F. Bolstering Ashley Price's Credibility with Inadmissible Information about her Lack of Prior Felony Convictions at the Time she Spoke with the Police

Next, still in his opening statement, the prosecutor supplied the jury with inadmissible information designed to bolster the credibility of his key witness, Ashley Price:

> You will hear that Ashley Price has been convicted of a felony on four times, four different occasions. But you will hear that when she went to the Tampa Police Department on June 29th, 2010, she had never been convicted of a felony at that point. You will hear that she is currently on probation on one of those cases. She violated her probation back in the early part of 2014, and that she was given time served on that violation, which the violation was - -

(21/1229)

The defense objected on grounds of improper bolstering, and pointed out that "the reason why prior impeachable convictions are admissible is the credibility of the witness as she's testifying on the witness stand"; not whether those convictions occurred before or after she gave a statement to police. The prosecutor - - ignoring the prior conviction aspect - - said "At this point I'm talking about her being on probation"; he asserted that the defense attorneys "are going to ask her that she violated in January 2014 and was reinstated on probation. So I wanted to bring that out and I think I am entitled to do that anticipatorily" (21/1230). However, the prosecutor's assumption as to what the defense intended to ask Ms. Price was mistaken. When Judge Fuente asked whether there was any suggestion that Ms. Price got a deal in exchange for her testimony, defense counsel answered, "No, Your Honor, we are not prepared to argue that." (21/1230). Nor - - contrary to the prosecutor's represen-

tation - - did the defense intend to bring out anything about Ms. Price either being on probation or her being reinstated on probation (21/1230-31). The prosecutor said "Okay. That's fine" (21/1231), whereupon defense counsel asked for a curative instruction; [f]or the State to tell them that she was not convicted of anything at the time she spoke to the police is clearly improper" (21/1231). Judge Fuente said:

> I'll make the following observation. Whether a witness at the time he or she testifies has no prior felony conviction is never admissible. She has prior felony conviction, it is admissible. You have said what you said. I'll deny your request for a curative instruction. Just move on.
>
> MR. HARMON [prosecutor]: Yes, Sir.

(12/1231)

So, because the prosecutor "said what he said", he was able to get improper evidence before the jury to blunt the impact of the defense's entirely legitimate impeachment of the state's key witness. Ashley Price's lack of a criminal record at the time she spoke with the police was irrelevant and inadmissible. See Sanchez v. State, 445 So.2d 1 (Fla. 3d DCA 1984); Dumas v. State, 907 So.2d 560 (Fla. 4th DCA 2005). Moreover, the defense never suggested that Ms. Price's claim that Morris confessed to her was recently fabricated; rather, the defense's contention was that it was fabricated from the beginning. Mr. Harmon's impermissible bolstering of Ms. Price's testimony began in his opening statement, and - - as will be shown - - it continued unabated throughout his closing argument.

G. Shifting the Burden of Proof to the Defense to Show that Ashley Price had a Motive to Fabricate

Mr. Harmon chose to reserve nearly all of his commentary -- proper and improper alike -- for his rebuttal closing argument, which had the effect of foreclosing defense counsel from specifically responding to his statements with the jury. See 26/1759-61 (initial closing argument); 26/1784-1828 (rebuttal closing argument). He began:

> I'm going to go ahead and start. Miss Blevins needs to set up some equipment.
>
> Ashley Price is the heart of the State's case. She is the heart and soul of this case much there's no doubt about that. She is.
>
> I want to talk to you just real quick about some of the other evidence in this case. Ashley Price tells you she had met with the detective on June 29 of 2010. She had gone down there with absolutely no motive to go forward. No motive to go there other than to tell the truth. And there's been no suggested motive to her cross examination - -
>
> MR. ANDERSON [defense counsel]: Objection. Burden shifting.
>
> MR. HARMON: - - of any kind of motive on her part - -
>
> THE COURT: [W]hat?
>
> MR. ANDERSON: Objection. Burden shifting.
>
> MR. HARMON: - - of any kind of motive for her to come in and fabricate. In fact, this young lady had to come in here and sit on that witness stand in front of all of you people. She doesn't know anything about these people. She doesn't know all the folks sitting out there in the audience. People that she doesn't know and talk about her sex life and talk about personal things like the fact that she's a four-time convicted felon. Think about how uncomfortable that would be for a person to come in and go through that and sit on the witness stand. And there's been no motive suggested through her cross-examination or through the evidence for her to come in and fabricate.

(26/1784-85) (emphasis supplied)

"It is improper for the state to shift the burden of proof in closing argument." Sempier v. State, 907 So.2d 1277,1278 (Fla. 5th DCA 2005). In Bell v. State, 108 So.3d 639,645,648-49 (Fla. 2013), the prosecutor argued, inter alia, "So, if you are looking for a reason not to believe [the victim] there isn't one. Because there is no evidence that she would have made this up at this particular time under these particular circumstances." This Court found that the prosecutor had improperly shifted the burden of proof. "By stating that 'there is no evidence' to contradict the victim's testimony, the prosecutor highlighted Bell's failure to present any evidence impeaching the State's witness. The prosecutor's comment thereby implied that Bell had a burden of proof regarding the witness' credibility . . ." 108 So. 3d at 648-49. See Lawson v. State, 886 A. 2d 876,889-91 (Md. 2005) (prosecutor's comments improperly tended to shift the state's burden by insinuating that the defense had a burden to present evidence that the child witness had a motive to lie); People v. Levandowski, 780 N.Y.S. 2d 384,386 (2004) ("During summation, the prosecutor improperly stated that defendant had failed to prove the victim's motive to lie, thereby suggesting that defendant bore the burden of proof in that regard"); People v. Casanova, 988 N.Y.S. 2d 713,715 (2014) (prosecutor improperly suggested that the defense had been unable to establish that the confidential informant had a motive to lie).

The prosecutor's burden-shifting in the instant case was even more egregious and explicit than in Bell, because here he specifically commented to the jury - - twice - - that there was no motive shown on cross-examination for Ashley Price (the heart

and soul of the state's case) to come in and fabricate. Moreover, the burden-shifting comments were juxtaposed with an appeal for sympathy for Ashley Price in that she had to endure the discomfort of talking before a roomful of strangers about her sex life and "personal things like the fact that she is a four-time convicted felon". So, after improperly informing the jurors during his opening statement that Ashley Price had not been convicted of any felonies at the time she spoke with the police, the prosecutor was now attempting to spin a factor which reflected negatively on her credibility (i.e. her four convictions) into a reason for jurors to feel sorry for her, since the defense had not shown that she had a motive to lie.

H. Repeated Expressions of the Prosecutor's Personal Opinion of Morris' Guilt

Next, the prosecutor shared with the jury his personal belief about the veracity of yet another important state witness, characterizing him as "this very credible young man, Joe Anderson" (26/1792). Shortly thereafter he stated, "Folks, this defendant is guilty all day long. There is no doubt." (26/1794). Then - - after a long interlude during which he played more than a dozen excerpts from the jail phone calls accompanied by his running commentary (more about that to come) - - the prosecutor went back to expressing his personal belief in Morris' guilt. Before discussing the "I repent for killing" statement [see Issue II, supra], the prosecutor said, "And lastly, I want to talk to you about this next witness' testimony because really at this point you don't need anything else. There's no doubt in this

case" (26/1817) (emphasis supplied). Then, after claiming that the "I repent for killing" statement (which did not reference the Derek Anderson murder, and which contained no details which might link it to the Derek Anderson murder) was "in and of itself, proof beyond and to the exclusion of all reasonable doubt", the prosecutor stated once again, "There is no doubt in this case who the murderer of Derek Anderson was. It was this defendant sitting here" (26/1817) (emphasis supplied). Finally, as the climax of his closing argument, the very last thing the jury heard from either counsel:

> This case deserves a lawful and true verdict. State of Florida, the plaintiff in this case, is entitled to that true and lawful verdict. And we would encourage you to find that. There is no doubt in this case, no doubt at all that this defendant murdered Derek Anderson.
>
> I told you in my opening statement it would be as clear as me standing in front of you and it is. This defendant murdered Derek Anderson. And you can be as sure of that - - you can be as sure of that as night follows day, as morning follows night this defendant is a murderer.

(26/1828) (emphasis supplied)

The current version of the ABA standards provides "The prosecutor should not express his or her personal belief or opinion as to the truth or falsity of any testimony or evidence or the guilt of the defendant". ABA Prosecution Function Standard 3-5.8 (b) Argument to the Jury (1993). See Morales v. State, 133 A.3d 527, 530-31 n.19 (Del.2016). The Comment to rule 4-3.8 of the Florida Rules of Professional Conduct states that Florida has adopted the ABA Standards. See Bass v. State, 547 So.2d 680, 682 n.2 (Fla. 1st DCA 1989). Moreover, Rule 4-3.4(e) prohibits a lawyer at trial from expressing his or her personal opinion re-

garding, inter alia, the guilt or innocence of an accused. See, e.g., Ruiz v. State,743 So.2d 1(Fla.1999), quoting United States v. Garza, 608 F.2d 659,662-63 (5th Cir.1979); Sempier v. State, 907 So.2d 1277,1278-79 (Fla. 5th DCA 2005); Servis v. State, 855 So.2d 1190,1196 (Fla. 5th DCA 2003); Singletary v. State, 483 So.2d 8,10 (Fla. 2d DCA 1985).

In order to run afoul of the prohibition against expression of his personal opinion of the accused's guilt, it is not necessary that the prosecutor preface his comments with "In my opinion" or "I believe". See Morales v. State, 133 A. 2d at 530-531. A prosecutor's dogmatic assertions of certainty are just as improper, if not more so. See Sempier, 907 So.2d at 1279 ("The prosecutor's pronouncement that Sempier 'is guilty' and that 'he did it' improperly injected into the jury's consideration her personal beliefs as to Sempier's guilt, and could have contributed to [his] conviction"; Pantano v. State, 138 P.3d 477,484 (Nev. 2006) ("With regard to the statement, '[t}here's no doubt he's guilty', the prosecutor improperly stated her personal opinion regarding Pantano's guilt"). As explained in United States v. Bess, 593 F.2d 749,755 (6th Cir. 1979):

> Implicit in an assertion of personal belief that a defendant is guilty, is an implied statement that the prosecutor, by virtue of his experience, knowledge and intellect, has concluded that the jury must convict. The devastating impact of such "testimony" should be apparent. Equally apparent should be the serious infringement upon a defendant's due process rights. Such statements infringe upon the role of the jury as fact finder and determiner of guilt or innocence. They amount to inadmissible and highly prejudicial evidence.

In the instant case, the prosecutor not only stated outright that Dontae Morris was guilty, he did so repeatedly, dogmatically, and colorfully. "Folks, this defendant is guilty all

day long" is nothing more and nothing less than a blanket statement of opinion. At the very end of his closing argument (four pages removed from any discussion of the evidence), Mr. Harmon circled back to this technique, drawing the jurors' attention to himself ("as clear as me standing in front of you") and assuring them of his absolute certainty ("This defendant murdered Derek Anderson. And you can be as sure of that . . . as night follows day, as morning follows night this defendant is a murderer").

"A prosecutor's role in our system of justice, when correctly perceived by a jury, has at least the potential for particular significance being attached by the jury to any expressions of the prosecutor's personal beliefs". Singletary, 483 So. 2d at 10; Sempier, 907 So.2d at 1279. In this trial, the prosecutor not only repeatedly assured the jury of his certainty of Morris' guilt, he also (as will be shown) vouched for the credibility of the state's key witness Ashley Price; translated for the jury his own interpretation of the ambiguous street language used by the five participants in the recorded phone call from the jail; and provided the jury with prejudicial facts or innuendo regarding illegal drug operations far beyond the evidence. He also (as has been shown) shifted the burden of proof by suggesting that the defense had failed to show by cross-examination that Ashley Price (the "heart and soul" of the state's case) had a motive to fabricate. Considering the cumulative effect of his objected-to and unobjected-to comments which pervaded his opening and closing arguments, the fairness of Morris' trial was irreparably compromised. See Ruiz, Sempier.

I. The Prosecutor's Running Commentary in which he Essentially Provided the Jury his own Translation of the Recorded Phone Conversations

Midway through his closing argument the prosecutor turned his attention to the recorded phone call, playing more than a dozen excerpts from the audiotape (26/1803-17, 1823-24). In all, over one-third of his closing argument consisted of these excerpts and his accompanying commentary. The phone call, made by Morris from the jail, included a sequence of conversations with Dwayne Callaway, Javonte Dennard, Tiffany Price and Ashley Price. The recording was authenticated by a sheriff's office employee assigned to work with Securus (a private company which contracted to record inmate phone calls), and by the state attorney's investigator who listened (on the same date but not in real time) to the March 4, 2011 phone call (23/1520-36); and it was played to the jury during the testimony of Detective Charles Massucci of the Tampa Police Department (23/1536-68). Detective Massucci participated in the investigation of the homicide of Derek Anderson (23/1538). He is familiar with Dontae Morris' voice and has heard him speaking in person (23/1539-40). Dwayne Callaway is Morris' stepbrother. Detective Massucci has had contact with him and is familiar with his voice (23/1540). Javonte Dennard has a nickname of Pedro; Massucci has had contact with him, he's spoken with him, and is familiar with his voice (23/1540-41). Tiffany Price is Ashley Price's sister and is Javonte Dennard's "baby mama" (23/1554). Massucci is familiar with Tiffany and Ashley's voices as well (23/1541).

The sequence of conversations begins with Morris speaking with Dwayne Callaway (23/1542-43). Then, via call-forwarding,

Javonte Dennard joins in (23/1545). The three men speak in a street slang and intonation, littered with profanity (23/1542-67). [The audiotape, State's Exhibit F, is in the appellate record. The transcript is substantially accurate, considering the participants' speech patterns, but some of what is labeled "unintelligible" can be discerned from the audiotape]. After the robo-voice discloses that the call is subject to recording and monitoring and thanks them for using Securus, the conversation between Morris and his brother begins "(Unintelligible)." "What are you doing?" "- - what's up?" "Still on the road?" "Yeah, man. I don't have a mother fucker (unintelligible) - - fat ass" (23/1542). It proceeds in the same vein until Morris asks Callaway if he has Pedro's number: "Hit his ass up real quick" (23/1544-45). The conversation between Morris and Dennard is as follows:

> I need you, I need you to make a few moves, man.
>
> No problem. No problem my nigga. I been screaming that D low (Unitelligible.)
>
> You remember who, who you and your, you and your lady had put me down with?
>
> Yeah.
>
> Yeah, man, she's - - she unrighteous right now, man.
>
> Yeah.
>
> But listen, listen. It's not her fault, though. You smell me?
>
> Yeah.
>
> (Unintelligible) - - got her feeling it. You smell me?
>
> Yeah.
>
> So only thing I need is for like you to holler at her and let her know - - see, the only thing she have to do

is, when I tell my attorney to go and talk to her, she tell him the truth. You smell me?

Yeah.

Saying that she done know me for years and - - I mean, all that type of foolishness.

No shit.

She's telling the people we done had sex and I ain't even got a chance to get her home or nothing. I wish I did, you know.

What the fuck?

Yeah. All type of dumb shit. But I know, I know why she's doing it, though, but I can't, I can't be mad at her, you know, because I know that they'll probably threaten her to take her children and all type of dumb shit. You smell me?

Yeah.

And - -

Yeah.

You remember what (Unintelligible) baby mama?

Uhn - - uhn - - Damn. Ah, ahah,

(Unintelligible.) Who?

The fat one.

The, uhn, (Unintelligible.) Fuck. Fuck. Fuck. Fuck. Fuck.

The fat one.

Oh, yeah, yeah, yeah, yeah, yeah, yeah.

Yeah, She unrighteous all the the way through-and-through, though.

Okay. Okay.

I can't - - ain't, ain't no need to be. You smell me?

Yeah.

I need them to - - when my attorneys come talk to them for them to just tell the truth. You smell me? That shit there, they, they the only thing holding me up in there.

That's it?

That's the only thing that's holding me up. People - - they done went to people and got people lying on me and stuff. You smell me?

Yeah, yeah, yeah. Hell, yeah.

The only thing they have to do is go and talk to them. When they talk to them and they tell them the truth, they can bring that shit to court, like, man, this what the police been doing. You smell me? They been making all these people lie on this, man. You smell me?

Yeah, Hell, yeah, Hell yeah.

(23/1546-48)

After some unrelated small talk, in the same language ("[W]here the babies at, man? . . . You got a good vibe, man. Get the gwop man, (unintelligible) needs money, man. What's going on with your little man?" "Man, that nigga walking and all, man." "Yeah, man. Nothing wrong with that, man" (23/1549)), Morris repeated that "we gonna get this here taken care of so I can get up out of here, man" (23/1550). Dennard said "[w]e most definitely gonna get that taken care of now", referring to the situation with his "baby mama sister" (meaning Ashley Price)(23/1550). Morris wanted to talk to her and bring her for a visitation, to "let her know I ain't mad at her or nothing. You smell me?" (23/1551). He said "I can't get mad at her about nothing like that. That's - - I just want to have sex with her. Now she just owe me some pussy" (23/1551).

They called Tiffany Price on the three-way. Dennard got off the line, while Dwayne Callaway remained on, and Tiffany answered the phone (23/1551-54). Then a second female, Ashley Price, got on the phone, and a brief conversation took place be-

tween Morris (known to her as Quelo) and Ashley (23/1555-56). The entirety of their conversation is as follows:

(Unintelligible)

You know who this is?

Yeah.

Huh?

Yeah - - (Unintelligible.)

Who is that?

It's Quelo.

It's Quelo?

Yeah.

(Unintelligible?)

Can you hear me?

Oh, (Unintelligible) Hold on.

Yeah, I (Unintelligible.)

Hey, man, when you get a chance, man, I need to talk to you, man.

Okay. You want to set me your visitation?

Yeah.

Okay.

When you can talk?

When it's gonna be?

When can you come?

Huh?

I said, when can you come?

Any time. When can I come? Any time. Set me sometime tomorrow.

What time?

Like around two or three.

I'm gonna put you down for three.

Yeah.

You know why I want to talk to you?

Yeah. Well, I don't know - - well, not really. (Unitelligible) told me about the detective said something about a written statement.

Why you talking like that, man? Huh?

Talking like what?

Oh, man, come on. Now what's going on with y'all man?

Nothing that I know of.

Well, I wanna talk to you. Come tomorrow and I'll put you down, anyway. I'm gonna see what's going on.

What time?

At three.

All right.

All right.

All right.

All right.

Yeah.

(26/1557-59)

After Ashley gets off the phone, Morris, speaking once again with his brother Dwayne Callaway, says "I want to see what's going on with her, man", "[b]ecause I hope she don't keep up with the foolishness" (23/1560). "I just need my attorney to talk to her and she just tell him the truth. You smell me?" (23/1560). "Ain't no - - whatever she - - I don't know what she got going on, man. That shit there ain't even (Unintelligible)" (23/1560). "Hopefully she do come see me tomorrow" (23/1561).

Javonte Dennard rejoined the phone call (23/1561), and there was some confusion between Morris and Dennard about who was talking to the police:

> Try to hit them up, man. They done call the people or something, man, had the people on the phone, man. What's up. What's going on, bro?
>
> They had the people on the phone?
>
> I don't know, man. She talking crazy, man.
>
> Huh?
>
> She talking about some detectives and all (Unintelligible) What she talking about, man?
>
> No, she said she was (Unintelligible.) She said (Unintelligible) was in the room when she - - her sister said she was changing the children, 'cause she said she had you on speaker. She was in the room trying to change (Unintelligible). And she said she couldn't really hear what all you were saying over the phone.
>
> Nah. I'm saying - -
>
> She had done just hit me up.
>
> No. I'm talking about the other one, her sister.
>
> Huh?
>
> Her sister talking about some detectives and statements. Not sure what she talking about, man?
>
> Her sister?
>
> Yeah.
>
> (Unintelligible) - - baby mama, or baby mama sister, which one you want me to holler at?
>
> No, I'm saying her sister.
>
> Okay, okay, okay.
>
> I'm like, what's wrong? She talking about some statements. And what she, what she get that from?
>
> What she get what from? Detectives?
>
> Never mind. I don't, I don't know. This shit - -
>
> Can't really hear.

- - what's going on, bro.

And I can't too much hear what you saying. What you saying? What you trying to say, brother?

(23/1562-63)

At that point, Dwayne Callaway interjected and said to Dennard, "All right. Listen, man. Yo baby mama sister, man, was talking real retarded over the phone. We trying to see what's up" (23/1563-64). Morris said that Ashley was supposed to be coming to see him at the jail, and he was going to put her down for three o'clock (23/1564). Dennard said he would make sure she was there, and he was going to call her when he got off the current phone call and see what she was talking about; "I ain't even know her sister was out there with her" (23/1564). Dennard then hung up, and the conversation resumed between Morris and his stepbrother Callaway (23/1565). Morris said he knew all of them were probably in cahoots, and it was like they had his life in their hands; whatever they had going on he was trying to get it out of the way now (23/1566). The digital voice of Securus advised them that they had approximately one minute remaining (23/1566). Morris said to Callaway, "If I can go ahead and get her to talk to my attorney now and just tell the man the truth. You smell me? (23/1566). Then he could "get that dumb shit out of the way, you smell me, and go ahead on with my life. You know what I mean?" (23/1566).

I'm gonna put her ass down tomorrow, though, and see what's good, man.

Yeah, see what's good.

I'm fidden' to hit you back, too.

Yeah. Hit me back, man. (Unintelligible.)

All right. Man.

Yeah

Digital Voice: The caller has hung up.

(23/1567)

Detective Massucci testified that after becoming aware of the phone call, the jail - - at the request of the Tampa Police Department - - revoked Morris' phone privileges (23/1567-68).

Ashley Price had testified the day before the audiotaped phone call was played to the jury. Asked about the relationships among the people who participated in the call, she said she had met Dontae Morris, whom she knew as Quelo, through her sister Tiffany's boyfriend Javonte Dennard (Pedro). Pedro was good friends with Morris at the time. Ashley had sex with Morris on one occasion, but he wasn't really her type, and their relationship came to consist of daily phone calls in which, according to her, he would tell her things that were confidential. Ashley did not know Dwayne Callaway (22/1479-81,1484,1495-97,1500,1502). During the phone call on March 4, 2011, Ashley told Morris that she would meet with him in the jail the next day, but she never intended to go there and she did not go there (22/1497-98).

J. The Prosecutor's Commentary on the Recorded Phone Call was Riddled with (1) his Personal Opinions of Morris' Guilt, the Meaning of Morris' Words, and Ashley Price's Credibility; (2) Innuendo Suggesting Prejudicial Facts Unsupported by any Evidence; and (3) an Improper Basis for Convicting Morris Based on his Supposed Efforts to Intimidate and Manipulate Ashley Price

It is important to note that Morris is not challenging on appeal the admissibility of the audiotaped phone call for two reasons; one, the defense did not move to exclude it, and, two,

the reason the defense attorneys may not have moved to exclude it could be because they viewed it as potentially exculpatory, since Morris said several times that he just wanted Ashley Price to tell his attorney the truth (23/1546,1548,1560,1566). Certainly under Florida law a defendant's attempt to intimidate a state witness is relevant and admissible to show consciousness of guilt. See, e.g., Smith v. State, 170 So.3d 748,757-58 (Fla. 2015) (Smith told a fellow inmate to relay a message to a third inmate, Cellecz (who was snitching on him) that he had "something for [Cellecz'] ass", and that he knew where Cellecz' wife and child were and he had something for them as well); England v. State, 940 So.2d 389,401 (Fla. 2006) (England told a witness that if codefendant got him in trouble that he would kill him); Heath v. State, 648 S.2d 660,664 (Fla. 1994) (Heath told cellmate only two people in the world - - Cindy and Jennifer - - could tie him to the murder and he wanted to get out and "blow their fucking brains out"); Jenkins v. State, 697 So.2d 228 (Fla. 4th DCA 1997) (eyewitness testified that as he and Jenkins were leaving the scene of the shooting Jenkins pointed the gun at him and threatened to kill the witness and his grandmother if he said anything).

In the instant case, in contrast, Morris never said anything remotely threatening to Ashley Price during their brief conversation. (23/1557-59). Nor did he threaten Ashley at any time during his longer conversation with his brother and cousin. [Instead he said he couldn't be mad at her because they'd probably threaten to take her children away "and all type of dumb shit" (23/1547)]. The recurrent theme of the conversation was a

frustrated confusion as to what she might be telling the police, and wanting to find out. Obviously Morris was upset, but was he upset because she was lying and he wanted her to tell the truth (as he stated on four occasions), or was he upset because she was telling the truth and he wanted her to lie (as the prosecutor insisted), or was he simply upset because he didn't know what she was saying? Nothing in the audiotaped phone conversation even refers to the Derek Anderson homicide, and (as the prosecutor represented in his 2011 response to Morris' motion to set bond) Ashley Price was an essential state witness in all four of the pending cases against Morris(2/266). As recognized in Williams v. State, 145 So.3d 997,1000 (Fla. 1st DCA 2014), "[t]o attempt to persuade a witness to testify truthfully is not a crime", and is not witness tampering. Here, the audiotape does not show that Morris attempted to persuade Ashley to do anything other than to visit him in the jail (which she readily agreed to do, though she didn't intend to follow through on it), and all he told his brother and cousin was that he wanted her to tell the truth.

Assistant State Attorney Harmon believed that Morris meant something different than what he said. Because the digital voice advised that jail phone calls were monitored, Mr. Harmon believed that Morris and his brother and his cousin were speaking in some sort of code, where - - for example - - the phrase "you smell me?" - - signaled that when he said he wanted Ashley to tell the truth he meant the exact opposite; that he wanted her to lie and/or to stop telling the police the truth. And as a result, Mr. Harmon devoted a large portion of his closing argument

not to fair comment on the evidence but to sharing with the jury his own personal opinion of what the parties to the conversation actually meant; in effect, translating it for the jury. In United States v. Peoples, 250 F.3d 630,639-42 (8th Cir 2001), an F.B.I. agent was erroneously allowed, when recordings of jail telephone and visitation conversations were played to the jury, "to offer a narrative gloss that consisted almost entirely of her personal opinions of what the conversations meant". Id, at 640. Peoples was followed by the Fourth Circuit in the analogous case of United States v. Johnson, 617 F.3d 286,292-93 (4th Cir. 2010). See also Thorp v. State, 777 So.2d 385,394-96 (Fla. 2000). For a prosecutor to offer such a narrative gloss consisting of his personal opinions of what the parties to a recorded conversation meant is, if anything, even worse, in view of the respect and deference jurors accord to his position. See, e.g., Berger v. United States, 295 U.S. at 88; Ruiz v. State, 743 So.2d at 4; United States v. Garza, 608 F.2d at 662-63 and 665-66. When a prosecutor translates for the jury in this manner, he essentially becomes an unsworn witness. See Commentary to ABA Standards for Criminal Justice 3-5.8 (Expressions of personal opinion by the prosecutor are a form of unsworn, unchecked testimony and tend to exploit the influence of the prosecutor's office and undermine the objective detachment that should separate a lawyer from the cause being argued. Such argument is expressly forbidden by the ABA model ethics codes, and many courts have recognized the impropriety of such statements").

Here, the prosecutor replayed more than a dozen excerpts from the audiotape and commented on each. The earlier comments,

with some exceptions, are relatively innocuous, but as they go on they cross further and further over the line. In the earlier comments words and phrases like "Unrighteous", "Why you talking like that?", "Man, what's going on with ya'all man?", "That shit that ain't even sound right", "Hopefully she do come see me tomorrow", "She's talking crazy man", and "What she talking about, man?" (26/1805-12) are all given a prosecutorial spin as meaning that Morris was trying to intimidate or manipulate a truthful witness. During the very brief portion of the phone call in which Morris is speaking to Ashley Price (23/1557-59), where Morris says "Well, I wanna talk to you. Come tomorrow and I'll put you down, anyway. I'm gonna see what's going on" (23/1559), the prosecutor describes this as "very ominous" (26/1808-09), implying a threat to her personal safety which the evidence does not bear out.

By the time he got to the thirteenth excerpt the prosecutor had built up to a crescendo of his personal opinions that (1) Ashley Price is truthful; (2) Morris was trying to manipulate and intimidate this truthful witness; and (3) that such behavior amounted to conclusive proof of his guilt (23/1815-17). Mr. Harmon then went on to speculate what would have happened if Ashley Price had gone to visit Morris in the jail, and to vouch for her credibility (23/1816). And finally, after he'd apparently finished playing the series of excerpts from the audiotape (26/1815), he played one final selection, and in his ensuing commentary he insinuated facts not in evidence to suggest to the jurors that he knew that Morris was not merely a small-time seller of marijuana but that he was the unquestioned leader of

a drug enterprise which included Dwayne Callaway and Javonte Dennard. Needless to say, that bit of non-record evidence (whether it was true or false) put a whole different spin on the phone call, which is exactly what the prosecutor intended it to do.

After the thirteenth excerpt from the phone conversation, consisting of "Oh man. This ain't real, man. What's going on, bro?" (26/1813). Mr. Harmon says to the jury:

> He's interrupted by his brother. But he says, this shit ain't looking too good, man. What's going on, bro? It ain't looking too good because she's talking to the police.
>
> Now, why would it not look good to him if she was talking to the police? He would want her to talk to the police, right, to tell the truth if that's what he's trying to get at. He ends up telling him, call and see what's good, man.
>
> Now, it's pretty clear from that telephone call that the truth is the last thing this defendant is concerned about. And I think that's very clear now.

(26/1813) (emphasis supplied)

After expressing his opinion that the truth is the last thing Morris is concerned about, Mr. Harmon purports to explain to the jury that the phrase "you smell me?" is a coded way of imparting to the listener that he means the opposite of what he says; something like a verbal "wink-wink":

> What I would tell you and when you listen to this, if you do, listen to every single time because he never tells her to tell the truth. But when he's talking to Pedro and his brother he says I need her to go tell - - talk to my attorneys and tell them the truth. Ya smell me? Every single time he says it he qualified it with, ya smell me? And what can we know from the context of that? It's a very bizarre way of him saying, you got me, you understand, without him telling them, I need her to change her story. I need her to come tell my attorney something different. Every single time you hear

him mention telling the truth, he's going to use the term, you smell me.

Listen to it when you go back there and you will hear it every single time. And that is easily deciphered. You get me, you read me, you know what I mean.

(26/1814) (emphasis supplied)

It should be noted that Morris didn't just use the phrase "you smell me?" whenever he said he wanted Ashley to tell his attorneys the truth. He used that phrase no fewer than seventeen times during the phone call, in a variety of contexts (23/1546-48, 1550-51, 1560, 1565-66); a fact which defense counsel had no opportunity to point out to the jury. In a 2011 bond hearing Mr. Harmon had asked his witness Sally Blevins - - who had monitored numerous phone calls made by Morris ever since his arrest - - if "you smell me?" is a phrase Morris uses frequently. She replied "All the time". It is kind of a substitute for "you understand me?" (2/371, see 357-58). So Mr. Harmon's translation for the jury at trial transformed a verbal tic into a nefarious code. Either he was giving the jurors his personal opinion of what Morris' words meant, or - - worse yet - - they would believe he knew what Morris' words meant due to his personal familiarity with those individuals or that subculture].

After playing the thirteenth excerpt, in which Morris says to Javonte Dennard, "I need you to make a few moves, man", and Dennard replies "No problem my nigga", the prosecutor said to the jury:

I need you to make a few moves. Does that sound like someone who's trying to get to the truth? Listen, we need to talk to Ashley Price and we need to convince her to tell the truth and stop lying about this. She needs to go talk to the police. Is that what we heard in, no, I need you to make a few moves, man?

> You know, folks, I know that was a little repetitious to go through all of that. I didn't want to play the whole call, that's why I played sections of it. But what I would submit to you in addition to all the other evidence in this case of this defendant's guilt, is that this type of evidence, when a defendant who is sitting in the county jail charged with a capital murder, gets on the phone and calls the most critical witness in the case and tries to do what he tried to do there, that kind of evidence attempts to manipulate, to cover up, to conceal, to get rid of evidence, that kind of critical evidence the heart of the State's case, that kind of evidence, that kind of evidence just it just drips with guilt. It really does. It just reeks and smells of guilt. You can't get more evidence of guilt than a defendant's attempts to cover up evidence against him in a case.
>
> And think about what could have been lost. Think about that if this had not been intercepted and Ashley had gone there. No how and no why. We wouldn't have known the details of the murder. Think about how critical her testimony was. This defendant, the last thing he wanted was for this witness to walk in here and get on that stand as courageous as it was for her to do and testify to you.

(26/1815-16) (emphasis supplied)

Defense counsel objected on grounds of improper bolstering (26/1816). The judge overruled the objection (26/1816), and the prosecutor continued:

> He didn't want her talking to the police and he didn't want her talking to you in this trial because he didn't want to wait for this trial. He wanted to get up outta there. And, as I said, you need any other evidence of her credibility and the veracity of her testimony, you don't need to look any further than him and the attempts he made to get rid of it to manipulate her.

(26/1817)

Shortly thereafter, when the prosecutor was arguing (based solely on Ashley Price's testimony) that the motive for the murder was that Derek Anderson has disrespected Morris when he confronted Anderson on the apartment complex' basketball court for selling weed on his turf (26/1822-23, see 22/1490-93), the six-

teenth excerpt from the jail phone call was played. Morris said, "She supposed to be coming to see me tomorrow at 3:00, man", and Pedro (Javonte Dennard) said, "I'm gonna make sure she there. I'm gonna make sure she there, man" (23/1564; 26/1823). Stopping the audio, Mr. Harmon said to the jury:

> All he's got to do is mention that he wants her there at three. Listen to the snap-to-it attitude of Pedro. In the beginning when he said I need to you make a few moves. No problem, no problem. Listen to the control he had to reach out to the heart of the State's case through three people, through multiple three-way calls. The control this defendant exerted over these people, his brother ([Dwayne Callaway], Javonte Dennard, Tiffany Price. None of them hesitated or questioned him in any way. That tells you, corroboration of his intent to control and dominate the drug turf that he ran. That's why Derek Anderson's life was snatched away by this defendant in such a ruthless and cold-blooded manner was a desire to dominate and control.

(26/1823-24) (emphasis supplied)

By that insinuating remark, Mr. Harmon conveyed to the jury that he knew something which they (previously) did not know; i.e., that Morris' brother, his cousin, and Ashley's sister were lieutenants or underlings in a drug enterprise run by Morris. No evidence supported the prosecutor's innuendo.

If there is a standard of professional conduct even more basic than refraining from arguing one's personal beliefs, it is that counsel - - whether a prosecutor, defender, or civil litigator - - must confine his or her argument to the evidence. See ABA Standards for Criminal Justice: Prosecution and Defense Function, 3-5.9. The Commentary to this standard explains:

> At the trial level, it is highly improper for a prosecutor to refer in colloquy, argument, or any other setting to factual matter beyond the scope of the evidence or the range of judicial notice, other than in response to defense counsel's nonprovoked statements outside of the record. This is true whether the case

> is being tried to a court or to a jury, but it is particularly offensive in a jury trial.

See also the commentary to ABA Standard 3-5.8, which states:

> The most elementary rule governing the limits of argument is that it must be confined to the record evidence and the inferences that can reasonably and fairly be drawn from it. Assertions of fact not proven amount to unsworn testimony of the advocate and are not subject to cross-examination. Prosecutors have aptly been condemned by courts for the clearly improper use before the jury of evidence that had not been or could not have been introduced in evidence at the trial.

Accordingly, a prosecutor "may not suggest that evidence which was not presented at trial provides additional grounds for finding [a] defendant guilty." Ruiz v. State, 743 So.3d 1, 4 (Fla.1999). See, e.g., Huff v. State, 437 So.2d 1087, 1090-91 (Fla. 1983); Crew v. State, 146 So.3d 101, 108-09 (Fla. 5th DCA 2014); Servis v. State, 855 So.2d 1190,1194 (Fla. 5th DCA 2003); McLellan v. State, 696 So. 2d 928,930 (Fla. 2d DCA 1997); Pacifico v. State,642 So. 2d 1178,1184 (Fla. 1st DCA 1994); Ryan v. State, 457 So.2d 1084,1089-90 (Fla. 4th DCA 1984); Wheeler v. State, 428 So.2d 109,110 (Fla. 1st DCA 1982), approved in State v. Wheeler, 468 So.2d 9798 (Fla. 1985).

The only evidence at trial pertaining to the three other people in the phone conversation came from Detective Massucci and Ashley Price. Massucci identified Dwayne Callaway as Morris' stepbrother, while Ashley didn't know Callaway. Massucci identified Javonte Dennard as Morris' cousin. Ashley said Dennard was her sister Tiffany's boyfriend, and that he was good friends with Morris (22/1481,1496; 23/1540-41,1545). Ashley knew Derek Anderson from seeing him around the Johnson Kenneth Court Apartments, and although he usually maintained a job she knew him on

occasion to also sell marijuana in the apartment complex (22/1482-83). According to Ashley, Morris told her he'd had an argument with Anderson on the basketball court the day before the shooting. Morris had told Anderson he couldn't sell weed on his turf, and Anderson's reply was along the lines of "Who are you to tell me, like where do you come from? Who are you to tell me where I can sell weed at?" They'd almost gotten into a fight, but it was broken up (22/1490-94). Ashley's testimony was the only evidence of any uncharged criminal activity by Morris, and there was no evidence of any kind that Dwayne Callaway, Javonte Dennard, or Tiffany Price had anything to do with it. There was no basis in the evidence to suggest that Morris was anything more than a small-time solo operator - -- a guy who sold weed in the apartment complex and didn't appreciate competition; and even that hypothesis is dependent on whether or not the jury believed Ashley Price.

Mr. Harmon's extra-record linkage of the telephone call and its participants to the weed-selling dispute between Morris and Anderson put a sinister spin on the entire phone conversation; one which was entirely unwarranted by the evidence. Bear in mind that nowhere in that phone conversation is there any mention of drugs or weed or Derek Anderson. Morris simply expresses concern about what Ashley Price may be telling the police; it is not even clear which case he thinks she's talking about, or whether he thinks it's all four cases. [As Mr. Harmon himself wrote in 2011, "On March 4, 2011, the defendant then turns his attention toward State witness Ashley Price who is an essential witness in every case pending against the defendant" (2/266)]. Now, in the

prosecutor's scenario presented to the jury in the trial for Derek Anderson's murder, "these people" are portrayed as underlings in "the drug turf that he [Morris] ran", and Morris appears to be not just a guy who (according to Ashley Price) sells weed in the apartment complex, but the unquestioned boss of a drug enterprise involving at least three subordinates. See State v. Ramos, 579 So.2d 360,362 (Fla. 4th DCA 1991) ("the record compels the conclusion that the prosecutor intended to create the impression in the mind of the jury that Ramos was caught up in an ongoing narcotics investigation and was a kingpin supplier of narcotics"). Worse yet, since the jurors had heard no evidence of any criminal activity on the part of Callaway, Dennard, or Tiffany Price, they would logically assume that this was something Mr. Harmon knew in his capacity as assistant state attorney; either from his investigation in this case or from prior dealings with them in other cases. See, e.g., United State v. Bess, 593 F.2d 749,755-56 (6th Cir. 1979) ("Many expressions of personal belief carry with them the clear import that counsel knows something which the jury doesn't and this is an additional reason to condemn them").

As this Court emphasized in Ruiz v. State, 743 So.2d at 4, "the role of counsel in closing argument is to assist the jury in analyzing [the] evidence, not to obscure the jury's view with personal opinion, emotion, and nonrecord evidence". Quoting Hall v. United States, 419 F.2d 582,583-84 (5th Cir. 1969) and United States v. Garza, 608 F.2d 659,662-63 (5th Cir. 1979), this Court said:

> The role of the attorney in closing argument is "to assist the jury in analyzing, evaluating and applying the

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

Ruiz, 743 So. 2d at 4 (emphasis in opinion)

Because of the confidence which jurors place in the prosecuting attorney, any "improper suggestions, insinuations, and, especially, assertions of personal knowledge are apt to carry much weight against the accused when they should properly carry none". Berger v. United States, 295 U.S. 78,88 (1934), quoted in Garza, 608 F.3d at 663.

> The power and force of the government tend to impart an implicit stamp of believability to what the prosecutor says. That same power and force allow him, with a minimum of words, to impress on the jury that the government's vast investigatory network, apart from the orderly machinery of the trial, knows that the accused is guilty or has non-judicially reached conclusions on relevant facts which tend to show he is guilty.

Ruiz, 743 So.2d at 4(quoting Hall and Garza).

K. Improper Vouching, and Inviting the Jury to Convict a Defendant for a Reason Other than his Guilt of the Charged Crime

Here, the prosecutor infused his commentary as he played selected portions of the recorded phone call with personal opinion and nonrecord evidence, seeking to persuade the jury that Ashley Price was a truthful witness and that Morris had tried to intimidate her. In so doing, he violated the prohibition against a lawyer expressing his personal opinion of a witness' credibil-

ity. Improper vouching is especially prejudicial when done by a prosecuting attorney, because of his status as representative of the people, and because of the jurors' likely belief that he may have knowledge of the case, the defendant, and the witnesses beyond what has been presented in evidence. See, e.g., Ruiz; Berger; Garza; Bess; Hall. "Bolstering the credibility of [a witness] by reference to matters outside the record is improper in closing argument" [Baldez v. State, 679 So.2d 825, 827 (Fla. 4th DCA 1996)], and Ashley Price was not just any witness. As Mr. Harmon readily acknowledged, she was the heart and soul of the state's case (26/1784). See Hodge v. Hurley, 426 F.3d 368, 378-80 (6th Cir. 2004) (prosecutor's misrepresentation of facts in evidence and his comments expressing his personal opinions on the credibility of key state witnesses amounted to prejudicial misconduct).

In the instant case, the prosecutor devoted nearly a third of his closing argument to the jail phone call, and after playing the penultimate excerpt he said to the jury that "when a defendant who is sitting in the county jail charged with a capital murder gets on the phone and calls the most critical witness in this case and tries to do what he tried to do there" - - " attempts to manipulate, to cover up, to conceal, to get rid of evidence" - - " it just drips with guilt. It really does. It just reeks and smells of guilt. You can't get more evidence of guilt then a defendant's attempts to cover up evidence against him in a case" (26/1815-16).

It is improper for a prosecutor to make statements which invite the jury to convict a defendant for a reason other than

his guilt of the crime charged. Ruiz v. State, 743 So.2d at 6; Gore v. State, 719 So.2d 1197,1200-01 (Fla. 1998); Northard v. State, 675 So.2d 652 (Fla. 4th DCA 1996); Bass v. State, 547 So.2d 680, 682 (Fla. 1st DCA 1989). Plainly, the prosecutor was urging the jury to convict Morris based on his supposed attempts to intimidate Ashley Price; when all the actual phone conversation shows is that he was trying to find out what she was telling the police, and it's not even clear which of the four pending cases he thought she was talking to the police about. He told his brother and his cousin that he wanted Ashley to tell his attorney the truth, and his very brief conversation with Ashley herself is limited to arranging a jail visit, and "Why are you talking like that, man?", "Now what's going on with you, man?", and "I'm gonna see what's going on" (23/1557-59). All the rest - - all the so-called intimidation and evidence-tampering which reeks and smells of guilt - - is nothing more than prosecutorial spin; the "narrative gloss" which he put on the phone call through personal opinion, translation of words and phrases used, and nonrecord evidence. In United State v. Johnson, 617 F.3d at 293; United State v. Peoples, 250 F.3d at 640; and Thorp v. State, 777 So.2d at 394-96, the spin was put on by witnesses, but, for the reasons heretofore discussed, its prejudicial impact on the jury may be even greater when the lay opinions are expressed by the prosecuting attorney himself.

After that, the prosecutor began to speculate "about what could have been lost" if Ashley Price had gone to the jail. "We wouldn't have know[n] why he murdered. We wouldn't have known the details of the murder" (26/1816). [Again, that assumes that

Morris would have tried to intimidate her; that he would have succeeded; and that the meeting at the jail would have anything to do with the Derek Anderson case]. Mr. Harmon went on, "Think about how critical her testimony was. This defendant, the last thing he wanted was for this witness to walk in here and get on that stand as courageous as it was for her to do and testify to you" (23/1816). After the defense's objection on grounds of improper bolstering was overruled (26/1816), the prosecutor continued, "He didn't want her talking to the police and he didn't want her talking to you in this trial because he didn't want to wait for this trial. He wanted to get up outta there. And, as I said, you need any other evidence of her credibility and the veracity of her testimony, you don't need to look any further than him and the attempts he made to get rid of it to manipulate her" (26/1816-17).

Whether - - in the context of an otherwise proper closing argument - - a prosecutor's characterization of his own key witness as "courageous" would constitute improper vouching might be a borderline call. Whether or not a witness is courageous does seem to be a matter of opinion. What makes the comment exponentially worse in the context of the instant case is the fact that Mr. Harmon's closing argument was positively riddled with his personal opinions of Morris' guilt, Ashley Price's credibility, the hidden meanings of what was said in the phone call, and the bad character and criminal activity of some of the participants in the phone call. Any danger or intimidation which Ashley Price faced in her "courageous" decision "to walk in here and get on that stand" to testify to the jurors was in the picture painted

by Mr. Harmon's argument, not in the evidence. To argue this before the jury as the only evidence they needed of Ashley Price's veracity and credibility amounts to highly improper prosecutorial bolstering of his own critical witness, the "heart and soul" of his case (26/1784, 1815-16).

L. The Cumulative Effect of the Prosecutor's Misconduct in his Opening and Closing Argument was Pervasive and it Deprived Morris of his Right to a Fair Trial

Ashley Price was a four-time convicted felon whose testimony - - if believed by the jury - - was the only direct evidence on the issue of identity, and it provided the only evidence of a motive. Apart from what the jury might or might not infer from the trajectory and location of the gunshot (and bear in mind that she claimed Morris said he'd shot the victim in the stomach, when in fact he'd been shot in the back), Ms. Price's testimony was the only evidence of premeditation. Since this was not a case in which felony murder was charged, instructed upon, or proven, the jury - - if it disbelieved Ashley Price or if it was not convinced beyond a reasonable doubt of her truthfulness - - might well have acquitted Morris outright, or might have convicted him of the lesser offense of second-degree murder.

Here, the prosecutor's improper bolstering of Ashley Price's critical testimony began in his opening statement when he informed the jurors of the inadmissible fact that she did not have any felony convictions at the time she spoke with the police in 2010. It continued into his closing argument where the first thing he did was shift the burden to the defense to present evidence of Ashley's motive to fabricate. Then - - after giving the jury a scenario of witness intimidation based not on

the recorded phone conversation (which the jury could have interpreted for itself, see Thorp, 777 So.2d at 395-96), but mostly on his own opinions as to what the participants meant and on nonrecord innuendo as to the nature of the participants' activities - - he further bolstered Ashley Price's credibility by telling the jurors she was courageous to walk in here and take the stand, when that was the last thing Morris wanted. The prosecutor even speculated about the evidence that might have been lost if Ashley had visited Morris in jail.

Interspersed with all of this was the staccato rhythm of the many "stone cold killer" comments in his opening statement (and again in his very minimalist initial closing statement), intended to stigmatize Morris before the jury heard a word of evidence; and his repeated comments on his certainty of Morris' guilt expressed in very personal terms: "Folks, this defendant is guilty all day long"; "There is no doubt in this case who the murderer of Derek Anderson was. It was this defendant sitting here"; and the coup de grace - - the very last thing the jury heard from either counsel - - "I told you in my opening statement it would be as clear as me standing in front of you and it is. This defendant murdered Derek Anderson. And you can be as sure of that - - you can be as sure of that as night follows day, as morning follows night this defendant is a murderer" (emphasis supplied).

In light of the totality of Mr. Harmon's argument, the phrase "me standing in front of you" should be seen as no accident. It was all personal; in his repeated assurances of Morris' guilt and Ashley Price's veracity and credibility, his running

commentary on the phone call, his slipping in highly prejudicial facts beyond the evidence. Whether based on the combined effects of the objected-to and unobjected-to misconduct, or on fundamental error, this Court should determine that Morris was deprived of his right to a fair trial, and should reverse his conviction and death sentence for a new trial.

[ISSUE IV] SHOWING THE JURY THE DASH CAM VIDEO OF THE MURDERS OF POLICE OFFICERS CURTIS AND KOCAB BECAME THE OVERWHELMING DEATURE OF THE PENALTY PHASE, AND DENIED MORRIS A FAIR JURY DETERMINATION OF WHETHER HE SHOULD BE SENTENCED TO DEATH OR LIFE IMPRRISONMENT FOR THE DEREK ANDERSON HOMICIDE

Florida has long reserved the death penalty for only the most aggravated and least mitigated of first-degree murders. See, e.g. State v. Dixon, 283 So.2d 1,7 (Fla.1973); Urbin v. State, 714 So.2d 411,416 (Fla. 1998). The facts and circumstances of the murder of Derek Anderson, in and of themselves, would not support a death sentence, since the state did not even try to present to the jury or judge any aggravating factor relating to the commission of the crime, or any status aggravator (such as prior violent felony, under sentence of imprisonment, etc.) which existed at the time of the charged homicide. The only aggravating factor relied on by the state was Morris' convictions for the murders of David Curtis, Jeffrey Kocab, and Rodney Jones (and the attempted robbery of Jones) (5/880; 8/1439-41, 1462-63; 30/2192-93); these offenses were committed after the Derek Anderson homicide but were tried earlier, resulting in prior convictions for later-occurring crimes. [Judge Fuente, who was the trial judge in each of Morris' cases except the Harold Wright homicide (which was nolle prossed), did not think the order of

the trials was random. When defense counsel pointed out - in a January 25, 2013 hearing on the admissibility of the "I repent for killing" statement in the Rodney Jones trial - - that the Jones case (in which the state was not seeking death) could potentially be used as an aggravator in a death penalty case, Judge Fuente replied, "That's why we are trying it first, I'm sure (3/565-66)]

While, under Florida law, a prior conviction for a later occurring crime may be considered as an aggravator [see King v. State, 390 So.2d 315,320-21 (Fla.1980);(Thomas) Knight v. State, 746 So.2d 423,434 (Fla.1998);(Ronald) Knight v. State, 770 So.2d 663,670 (Fla. 2000)], the aggravator is weightier when the defendant already had a history of committing violent crimes at the time of the charged homicide. See Urbin v. State, 714 So. 2d at 418 (emphasis in opinion) (noting, in a proportionality reversal, "that there is no dispute that the prior violent felony used as an aggravator for this killing actually occurred approximately two weeks after Jason Hicks' murder, as compared to the prior felonies involved in Livingston [v. State, 565 So.2d 1288 (Fla.1988)"). See also Hess v. State, 794 So.2d 1249,1266 (Fla. 2001) and Scott v. State, 66 So.3d 923,936 (Fla.2011).

While it is true that the state is not limited in a penalty phase to the bare admission of a prior conviction and may introduce some testimony as to the specifics of the crime, it is equally true that (1) such evidence must be excluded when its prejudicial impact exceeds its probative value (especially when the details of the other crime can be provided by less prejudicial means) and (2) such evidence cannot be allowed to become

the central feature of the penalty phase. See Rhodes v. State, 527 So.2d 1201,1204-05 (Fla. 1989); Duncan v. State, 619 So.2d 279, 282 (Fla.1993); Finney v. State, 660 So.2d 674,683-84 (Fla. 1995); Rodriguez v. State, 753 So.2d 29,44-45 (Fla. 2000); Singleton v. State, 783 So.2d 970,977-78 (Fla. 2001); Cox v. State, 819 So.2d 705,715-17 (Fla. 2002); Franklin v. State, 965 So.2d 79,95-96 (Fla.2007); Banks v. State, 46 So.3d 989,998-99(Fla. 2010); Hall v. State, 107 So.3d 262,273-75 (Fla.2012); Braddy v. State, 111 So.3d 810,858-59 (Fla.2012); Gonzalez v. State, 136 So.3d 1125,1149-51 (Fla.2014).

After Rhodes and Duncan, this Court concluded in the remainder of the above-cited cases that the evidence introduced by the state pertaining to the other crime was not so inflammatory or so emphasized as to become the central feature of the penalty phase. The instant case is different for a variety of reasons. First, two of the victims of the later-occurring homicides were law enforcement officers. Second, the murders of Officers Curtis and Kocab were the focus of massive emotionally charged media coverage in the Tampa Bay area. Third, due to the trial court's granting of the state's motion to reconsider selecting jurors from outside of Hillsborough County (coupled with the inadequacy of the voir dire process in this case to ensure a panel of impartial jurors despite the publicity), we simply do not know the extent to which Morris' jurors were affected by the publicity surrounding the Curtis/Kocab murders. Fourth, and most important, the evidence which the prosecution was allowed to introduce in this penalty phase was a harrowing dash cam video from Officer Curtis' patrol car. [The pretrial publicity includ-

ed a Bay News 9 report in which correspondent Holly Gregory - - after viewing the video (which had not been released to the public) at the State Attorney's Office - - said "I can tell you that watching these two Tampa police officers be killed on tape was an absolutely horrible thing to see" (Supplemental Record vol. 1, p.93)].

The dash cam video, over vigorous defense objection (28/1900-23; 29/1933-35), was introduced into evidence as State Exhibit B and was shown to the jury (7/1254; 29/1963-68). Defense counsel objected on the grounds that the prejudicial impact substantially outweighed any probative value, and that the video of the police officers' murders would overwhelm the jury and become the central feature of the penalty phase (28/1902-04,1907). Counsel pointed out that the relevant details of the shootings could be presented through witness testimony instead of the video (28/1903, 1920). One of the defense attorneys stated that she was present at one of Morris' earlier trials [which had to be his trial for the Curtis/Kocab murders themselves, since the video would not have been introduced in the noncapital Rodney Jones case], and "I think that it's important to put into the record the way those jurors reacted when they saw the video. It was very gruesome and very shocking. And I think it would be a great injustice to allow these jurors to see it because that would be the whole penalty phase" (28/1908). Judge Fuente - - ruling that the state could present the video up to and including "the initial interaction, the conversation, the identification by the passenger, and then the immediate shooting and then the two officers falling down" - - said he didn't disagree with

counsel that in the earlier case the jurors were "taken aback". He had no doubt that in this upcoming penalty phase that "different jurors would be affected in different ways, some taken aback, some not. But that is the nature of what we do. It's the nature of this business" (28/1921-22).

The next morning, immediately before the penalty phase got underway, defense counsel renewed his motion to exclude the dash cam video, urging that it would make rational, deliberate decision-making impossible and would render this penalty phase "a nullity and futility and a [fait accompli]" (29/1934). After 40 years experience, "I don't think I've ever been in a situation where I thought it was absolutely impossible to do my job because of an evidentiary ruling which allows the most inflammatory evidence in a penalty phase that I have ever seen and I feel that needs to made a record . . . ." (29/1934-35). Judge Fuente adhered to his prior ruling (29/1935).

The seven-minute portion of the dash cam video which was played to the jury begins at approximately 2:12 p.m. on June 29, 2010. Officer Curtis, traveling alone, is following a Camry. The police car's audio system is activated, and loud, ominous rap music can be heard. The Camry pulls over at 2:13:20 and Officer Curtis goes to the driver's side and begins questioning the driver, Courtnee Brantley, and the passenger, Dontae Morris. Curtis returns to his vehicle, runs their names through his in-car computer system, then walks to the passenger side of the Camry. Officer Kocab arrives on the scene in another vehicle. Officer Curtis opens the passenger door, orders Morris to step out, and (as Officer Kocab approaches) asks "what's the deal

with your warrant, anything? You know anything about it?" Morris says "Warrant?"; Curtis says, "Yeah"; and Morris says, "I ain't got no warrant". Curtis tells him to turn around and put his hands behind his back. Morris is standing facing the car door, with Curtis behind him to his right and Kocab behind him to his left. Morris leans forward slightly, then (with lightning speed) reaches into the car with his right hand, wheels around and fires two gunshots. Muzzle flashes can be seen. Officer Kocab is shot first, then Officer Curtis (who appears to be pinned against the door). Both officers fall immediately and are seen motionless in the grass, and at that point the tape is stopped. (State's Exhibit B; 29/1965-68; see 8/1440).

Shortly after the video was played, defense counsel stated, "going back to our original objection with the video becoming the focal point of the penalty phase", that she had observed that when the gunshots went off three jurors displayed an immediate reaction; one started crying, one jumped up, and one more was just "[c]ompletely in shock" (29/1979). The prosecutor said he was in a position when he could see the jurors out of his peripheral vision and he didn't notice anything like that (29/1979-80). Judge Fuente said he'd observed that some of the jurors were emotional and "some required tissues I guess to wipe tears"; he didn't see anyone that was in shock, but (echoing his earlier remark about "the nature of this business") "be that as it may that's the nature of such a proceeding. [U]nfortunately it is" (29/1980).

At the climax of his penalty phase closing argument, the prosecutor exhorted the jury, "these murders, these images look-

ing at you, they absolutely cry out to you. They cry out to you for a just and right sentence in this case and there's only one just and right sentence for this stone cold killer who sits across from you who unleashed this mayhem and destruction on this city in the summer of 2010 and that is that this killer should be put to death" (29/2035-36) (emphasis supplied).

Defense counsel's strongly expressed concerns about the inflammatory impact of the dash cam video were well-founded. Once this emotionally charged video was shown to the jury this proceeding ceased to be about the appropriate sentence for the Derek Anderson homicide, and became for all practical purposes a second penalty phase for the murders of the two law enforcement officers; a later-occurring episode for which Morris had already received two death sentences. A jury's penalty verdict should be based on a logical analysis of the evidence in light of the applicable law, not on an emotional response to the crime or the defendant. See Bertolotti v. State, 476 So.2d 130,134 (Fla. 1985); Cardona v. State, 185 So.3d 514,520 (Fla. 2016). Here, the introduction of the dash cam video created a likelihood that ten jurors' votes to impose the death penalty were based in large part on their visceral response to a different crime. Moreover, it was a different crime which had generated enormous pretrial publicity and community outrage. [See Issue I, supra]. It is not the nature of a judge's business to allow a death penalty jury to be swayed by raw emotion; it is his business to make appropriate rulings to preserve the fairness of the proceedings. Morris' right to a fair penalty hearing before an im-

partial jury was irreparably damaged, if not obliterated. His death sentence must be reversed for a new penalty trial.

[ISSUE V] MORRIS' DEATH SENTENCE, BASED SOLELY ON HIS CONVICTIONS FOR LATER-OCCURRING CRIMES, IS DISPROPORTIONATE AND VIOLATIVE OF THE EIGHTH AMENDMENT

In Crook v. State, 908 So.2d 350,357 (Fla.2005) (emphasis in opinion) this Court summarized the long-established Florida law regarding proportionality review:

> . . . this Court has consistently held that because death is a unique and final punishment, the death penalty must be reserved only for those cases that are the most aggravated and least mitigated. Kramer v. State, 619 So.2d 274, 278 (Fla. 1993). In Almeida v. State, 748 So.2d 922 (Fla. 1999), we explained: "Thus, our inquiry when conducting proportionality review is two pronged: We compare the case under review to others to determine if the crime falls within the category of both (1) the most aggravated, and (2) the least mitigated of murders." Id. at 933.

See also State v. Dixon, 283 So.2d at 7; Urbin v. State, 714 So.2d at 46.

To reiterate, a prior conviction for a later-occurring crime may be considered as an aggravator. King, 390 So.2d at 320-21; Knight, 746 So.2d at 434; Knight, 770 So.2d at 670. However, the "prior violent felony" aggravator is weightier when the defendant already had a history of committing violent crimes at the time of the charged homicide, and less weighty when he did not. See Urbin, 714 So.2d at 418; Hess, 794 So.2d at 1266; Scott, 66 So.2d at 936.

This Court has never affirmed a single-aggravator death sentence based solely on a prior conviction or convictions for crimes which occurred after the homicide for which the death penalty was imposed. To the best of undersigned appellate coun-

sel's knowledge, this Court has never even been presented with such a case. In such a case, a zero-aggravator homicide for which death is not even a possible punishment [see, e.g. Banda v. State, 536 So.2d 221,225 (Fla.1988); Elam v. State, 636 So.2d 1312,1314-15 (Fla.1994)] (and for which the state would not even be able to death-qualify the jury) can be transformed into a single-aggravator death case by manipulating the order of the trials, or by fortuitous luck of the draw.

Here, Morris was charged with five counts of first-degree murder in four separate cases. The Derek Anderson murder was the first to occur (see 8/1461, 1463; A2/290) and the last case (out of the three which went to trial) to be tried. The Rodney Jones case, in which the state was not seeking the death penalty, was the last-filed case and the first one tried. The homicides of police officers Curtis and Kocab were the last to occur and the second case tried. When, in a pretrial hearing in the Rodney Jones case, defense counsel pointed out that a conviction in that case could potentially be used as an aggravator in a death penalty case, Judge Fuente replied, "That's why we are trying it first, I'm sure" (3/565-66).

Morris was convicted of the Jones homicide and attempted robbery, and those convictions were used as an aggravator in the Curtis/Kocab penalty phase. [Note that - - in contrast to the situation in the instant case - - the Rodney Jones offenses were committed before the shootings of Officers Curtis and Kocab]. Then his convictions for the three homicides and the attempted robbery - - all committed after the Derek Anderson homicide - -

were used to establish the only aggravating factor in the Anderson penalty phase.

Either the three trials were deliberately scheduled in such a way as to convert the otherwise zero-aggravator Anderson case into a death case, or else the order in which the cases were tried was fortuitous. Either way, it injects an unacceptable element of arbitrariness and capriciousness into Morris' death sentence for the Anderson homicide. Whether on proportionality grounds (because the circumstances of the Anderson case do not reach the level of one of the most aggravated first-degree murders) or on Eighth Amendment grounds, Morris' death sentence should not be upheld.

Finally, this case is also not one of the "least mitigated". Judge Fuente found mental mitigation, to which he accorded moderate weight, based on Dr. Valerie McClain's Spencer Hearing testimony that Morris suffered from major depression with psychotic features, and that (while not retarded) he is an individual of borderline intellectual functioning; "these deficiencies could affect his judgment and impulsivity by compromising his ability to rapidly make a decision before actively thinking it through" (8/1466). Judge Fuente expressly stated that the contrary opinion (on the issue of low intelligence) of the state's expert Dr. Lazerou on rebuttal "does not diminish the weight or quality of the mental mitigation evidence" (8/1466). Judge Fuente also found 21 nonstatutory mitigating factors, and while twelve of these were given minimal weight, he accorded moderate weight to nine others. The moderate weight mitigators focused mainly on Morris' family relationships, his acts of generosity

("good Samaritan"), and on "the cumulative effects of the many negative and difficult factors" in his upbringing, and in the failure of the juvenile justice system to provide proper assistance (8/1467-71).

This is not one of the most aggravated and least mitigated first-degree murders. Morris' death sentence should be reversed for imposition of life imprisonment without parole.

[ISSUE VI] IN LIGHT OF THE JURY'S NONUNANANIMOUS (10-2) DEATH RECOMMENDATION IN THIS SINGLE AGGRAVATOR CASE WITH CONSIDERABLE NONSTATUTORY MITIGATION, MORRIS' DEATH SENTENCE IMPOSED UNDER AN UNCONSTITUTIONAL STATUTORY SCHEME CANNOT BE UPHELD ON A "HARMLESS ERROR" THEORY

A. Hurst

Morris' death sentence - - imposed under the statutory scheme held unconstitutional in Hurst v. Florida, 136 S.Ct.606 (2016) - - (1) violates the Sixth Amendment of the United States Constitution due to the absence of jury factfinding, and (2) violates the Sixth and Eighth Amendments and the Florida Constitution because it is based on a nonunanimous (10-2) vote of the jurors. This Court's October 14, 2016 decision in Hurst v. State, __So.3d__ (Fla.2016) [2016 WL 6036978] is dispositive on the merits. The only remaining question is whether this Court can determine beyond a reasonable doubt that the absence of jury factfinding as to all facts necessary to impose a death sentence, and the lack of a unanimous jury verdict, amounted to "harmless error". Under the Florida standard of State v. DiGuilio, 491 So.2d 1129 (Fla.1986) and the federal constitutional standard of Chapman v. California, 386 U.S.18 (1967) error cannot be written off as "harmless" unless the state can show be-

yond a reasonable doubt that the error could not have played a role in the jury's deliberations or contributed to its verdict. In the instant case, the Hurst error not only contributed to the verdict, the error is the verdict.

In Hurst, this Court held that:

> . . . [B]efore a sentence of death may be considered by the trial court in Florida, the jury must find the existence of the aggravating factors proven beyond a reasonable doubt, that the aggravating factors are sufficient to impose death, and that the aggravating factors outweigh the mitigating circumstances. . . . .
>
> . . . . . .
>
> We also conclude that, just as elements of a crime must be found unanimously by a Florida jury, all these findings necessary for the jury to essentially convict a defendant of capital murder-thus allowing imposition of the death penalty-are also elements that must be found unanimously by the jury. Thus, we hold that in addition to unanimously finding the existence of any aggravating factor, the jury must also unanimously find that the aggravating factors are sufficient for the imposition of death and unanimously find that the aggravating factors outweigh the mitigation before a sentence of death may be considered by the judge. This holding is founded upon the Florida Constitution and Florida's long history of requiring jury unanimity in finding all the elements of the offense to be proven . . .
>
> . . . . . .
>
> . . . [W]e also find that in order for a death sentence to be imposed, the jury's recommendation for death must be unanimous. This recommendation is tantamount to the jury's verdict in the sentencing phase of trial, and historically, and under explicit Florida law, jury verdicts are required to be unanimous.

2016 WL 6036978, p.10 (footnotes omitted)(emphasis in opinion)

Summarizing its decision, this Court said:

> . . . we reiterate our holding that before 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.

Moreover, jurors are never compelled nor required to recommend a death sentence; each juror may exercise his or her reasoned judgment as to whether to vote for death or life imprisonment without parole. Hurst, 2016 WL 6036978 p.13.

B. DiGuilio and Chapman

In DiGuilio this Court stated that "[t]he harmless error test, as set forth in Chapman and progeny, places the burden on the state, as beneficiary of the error, to prove beyond a reasonable doubt that the error complained of did not contribute to the verdict . . ." 491 So.2d at 1135.

> Harmless error is not a device for the appellate court to substitute itself for the trier-of-fact by simply weighing the evidence. The focus is on the effect of the error on the trier-of-fact. The question is whether there is a reasonable possibility that the error affected the verdict. The burden to show the error was harmless must remain on the state. If the appellate court cannot say beyond a reasonable doubt that the error did not affect the verdict, then the error is by definition harmful.

DiGuilio, at 1139 (emphasis supplied)

When the error is part and parcel of the verdict itself - - such as here, where (1) the defendant could not constitutionally be sentenced to death without a unanimous jury verdict and (2) the jury's verdict wasn't unanimous - - it defies imagination how the state could seriously contend that the error didn't "contribute" to the verdict. If the state were to argue that the two jurors who voted that Morris should be sentenced to life imprisonment without parole instead of death in this single-aggravator case were "wrong" or even "unreasonable", the state would be asking this Court to substitute itself as thirteenth

(and fourteenth) jurors to second-guess those two jurors' evaluations of the aggravating and mitigating evidence. While it might be possible for the state to argue, based on Neder v. United States, 527 U.S 1 (1999) and Washington v. Recuenco, 548 U.S. 212 (2006), that the jury must have unanimously agreed on the existence of the "previously convicted of a violent felony" aggravator, only the dissenting Justices in Hurst - - Justices Canady and Polston - - believe that is enough to sustain a death sentence, or to render Hurst error harmless. The five Justices in the majority could not have been any clearer in rejecting that position:

> Accordingly, we reject the State's argument that Hurst v. Florida only requires that the jury unanimously find the existence of one aggravating factor and nothing more. The Supreme Court in Hurst v. Florida made clear that the jury must find "each fact necessary to impose a sentence of death, " 136 S.Ct. at 619, "any fact that expose[s]the defendant to a greater punishment," id at 621, "the facts necessary to sentence a defendant to death," id., "the facts behind" the punishment, id., and "the critical findings necessary to impose the death penalty," id. at 622 (emphasis added). Florida law has long required findings beyond the existence of a single aggravator before the sentence of death may be recommended or imposed. See § 921.141(3), Fla. Stat. (2012).

Hurst, 2016 WL 6036978, p.10,n.7.

The two jurors who voted for life imprisonment in the instant case might well have concluded that the one aggravator was not sufficient to warrant the imposition of a death sentence in this case. The "prior violent felony" aggravator was based on crimes which occurred after the murder of Derek Anderson. The two jurors could reasonably have believed that the Anderson homicide itself was not an aggravated one; and if the murders of police officers Curtis and Kocab were deserving of the death

penalty it should be imposed in that case. (Which in fact it was). [Conversely, it is entirely possible that some or all of the ten jurors who voted for death may have been predisposed in that direction by the massive and inflammatory media coverage (see Issue I), or may have been influenced by emotion as a result of viewing the dash cam video of the officers' murders (Issue IV)]. As this Court has recognized in the context of proportionality review, the "prior violent felony" aggravator is weightier when the defendant already had a history of committing violent crimes at the time of the charged homicide, and less weighty when he did not [see Urbin, 714 So.2d at 418; Hess, 794 So.2d at 1266; Scott, 66 So.2d at 936], and this Court has never affirmed a single-aggravator death sentence based solely on a prior conviction or convictions for crimes which occurred after the homicide for which the death penalty was imposed. So the two jurors may simply have decided that the sum total of the aggravation in this case was insufficient to justify a death sentence.

Or the two jurors may have believed that the sum total of the nonstatutory mitigation in this case outweighed the single aggravating factor. The trial judge, in his sentencing order, found numerous nonstatutory mitigating circumstances arising from Morris' family relationships, his acts of generosity, "the cumulative effects of the many negative and difficult factors" in his upbringing, and the failure of the juvenile justice system to provide proper assistance (8/1466-71). The judge accorded nine of these mitigating factors moderate weight. [He also found a tenth moderate-weight nonstatutory mitigator based on Morris'

depression with psychotic features and his borderline to low average intelligence, but that was based on Spencer hearing testimony which the jury did not hear (8/1466)]. The two jurors who voted for life imprisonment may have accorded more weight to the mitigating evidence than the trial judge (and the other ten jurors) did; or they may have accorded them moderate weight like the trial judge did and still found that - - in combination - - they outweighed the single aggravator. A reviewing court should not second-guess the two jurors' factfinding and weighing determinations, any more than it should second-guess the other ten jurors' determinations.

Finally, even apart from the weighing of aggravators against mitigators, the two jurors had a right to exercise their reasoned judgment as to whether to vote for death or life imprisonment [Hurst], and that reasoned judgment should not be second-guessed on "harmless error" review.

On the question of whether the Hurst errors could have played a substantial part in the jury's deliberations [see DiGuilio, 491 So.2d at 1136], it is important to recognize that unlike the historical accident of jury size, the requirement of unanimity "relates directly [to] the deliberative function of the jury". United States v. Scalzitti, 578 F.2d 507, 512 (3d Cir.1978); see McKoy v. North Carolina, 494 U.S. 433,452 (1990) (Kennedy, J., concurring) (unanimity "is an accepted, vital mechanism to ensure that real and full deliberation occurs in the jury room, and that the jury's ultimate decision will reflect the conscience of the community"); State v. McCarver, 462 S.E.2d 25,39 (N.C.1995) (emphasis in opinion) ("[t]houghtful and

full deliberation in an effort to achieve unanimity has only a salutary effect on our judicial system: [I]t tends to prevent arbitrary and capricious sentence recommendations"). As the United States Supreme Court wrote in Jones v. United States, 527 U.S. 373,382 (1999) (quoting Allen v. United States, 164 U.S. 492,501 (1896)) ". . . [W]e have long been of the view that the '[t]he very object of the jury system is to secure unanimity by a comparison of views, and by arguments among the jurors themselves.'" The Jones Court further recognized the government's strong interest in capital sentencing "in having the jury express the conscience of the community on the ultimate question of life or death". 527 U.S. at 382) quoting Lowenfield v. Phelps, 484 U.S. 231,238(1988)).

Just as this Court recently did in Hurst and in Perry v. State, __So.3d__ (Fla.2016) [2016 WL 6036982], the Supreme Court of Delaware this year struck down that state's capital sentencing law due to its provision allowing nonunanimous jury death recommendations, observing that "[t]he unanimity requirement is vital to making sure that jurors deliberate and take each other's vote seriously, and that all jurors have equal voice in making this most critical of decisions." Rauf v. State, __A.3d__ (Del.2016) [2016 WL 4224252, p.34]. "More than four decades of social science research indicates that unanimous juries deliberate longer, discuss and debate the evidence more thoroughly, and are more tolerant and respectful of dissenting voices. Nonunanimous decision rules also tend to promote perilous racial dynamics". Rauf, 2016 WL 4224252, p.34, n.298 (quoting Stephen

F. Smith, The Supreme Court and the Politics of Death, 94 Va. L. Rev. 283, 287 (2008).

That unanimity vs. nonunanimity profoundly affects jury deliberations and verdicts was powerfully acknowledged by this Court in its Hurst opinion. It quoted with approval the observation made by Supreme Court Justice Kennedy while he was a judge on the Ninth Circuit Court of Appeals:

> The dynamics of the jury process are such that often only one or two members express doubt as to [the] view held by a majority at the outset of deliberations. A rule which insists on unanimity furthers the deliberative process by requiring the minority view to be examined and, if possible, accepted or rejected by the entire jury. The requirement of jury unanimity thus has a precise effect on the fact-finding process, one which gives particular significance and conclusiveness to the jury's verdict.

Hurst, 2016 Wl 6036978, p.14, quoting United States v. Lopez, 581 F.2d 1338, 1341 (9th Cir. 1978).

The Hurst decision also cited empirical and legal studies showing:

> . . . [I]t has been found based on data that "behavior in juries asked to reach a unanimous verdict is more thorough and grave than in majority-rule juries, and that the former were more likely than that latter jurors to agree on the issues underlying their verdict. Majority jurors had a relatively negative view of their fellow jurors' openmindedness and persuasiveness." See Elizabeth F. Loftus & Edith Greene, Twelve Angry People: The Collective Mind of the Jury, 84 Colum. L. Rev. 1425, 1428 (1984). Another study disclosed that capital jurors work especially hard to evaluate the evidence and reach a unanimous verdict where they can find agreement. See Scott E. Sundby, War & Peace in the Jury Room: How Capital Juries Reach Unanimity, 62 Hastings L.J. 103 (2010). Unanimous-verdict juries tend to be more evidence driven, generally delaying their first vote until the evidence has been discussed. See Kate Riordan, Ten Angry Men: Unanimous Jury Verdicts in Criminal Trials and Incorporation After McDonald, 101 J. Crim. L. & Criminology 1403, 1429 (2011). Further, juries not required to reach unanimity tend to take less time deliberating and cease deliberating when the required majority vote is achieved rather than attempting to obtain full consensus; and jurors operating un-

> der majority rule express less confidence in the justness of their decisions. See, e.g., Kim Taylor-Thompson, Empty Votes in Jury Deliberations, 113 Harv. L. Rev. 1261, 1272-73 (2000). All these principles would apply with even more gravity, and more significance, in capital sentencing proceedings. We also note that the requirement of unanimity in capital jury findings will help to ensure the heightened level of protection necessary for a defendant who stands to lose his life as a penalty.

2016 WL 6036978, p.14.

Regarding the importance of unanimity to assure reliability in capital sentencing, see also State v. Daniels, 542 A.2d 306, 315 (Conn.1988) (quoted with approval in Hurst, 2016 WL 6036978, p.15 and State v. Steele, 921 So.2d 538, 549 (Fla.2005).

In light of the strong emphasis in Hurst, and the other cases and authorities cited, on the critical - - and unquantifiable - - impact of unanimity vs. nonunanimity upon the dynamics of jury deliberations, there is no way this Court can determine beyond a reasonable doubt that the absence of unanimity in this case could not have affected the jury's deliberations, or its recommendation that Morris be sentenced to death. The jury's 10-2 "verdict" is the error. If - - as required by the Florida Constitution and the Sixth and Eighth Amendments - - a unanimous verdict had been required to recommend death, then the jury's initial 10-2 straw vote would have to have been resolved by comparison of views and discussion of the aggravating and mitigating evidence. Maybe the ten would have persuaded both of the two (which would be the only way a death verdict would be constitutionally permissible); or one of the two; or maybe the two would have persuaded some or all of the ten; or maybe each juror would have adhered to his or her original opinion. There is simply no way to know, and that is probably the strongest of the many rea-

sons why this Court cannot affirm Morris' death sentence on a "harmless error" theory under the DiGuilio and Chapman tests.

C. Caldwell

Another impediment to a "harmless error" finding under the DiGuilio and Chapman standards is that such a determination would require the reviewing court to speculate whether the jurors would necessarily have recommended a death sentence (much less whether they would have unanimously recommended a death sentence) if they had been instructed that their decision was anything more than "advisory". See Caldwell vs. Mississippi, 472 U.S.320 (1985). As Justice Lewis pointed out in 2002:

> . . . I write separately to express my view that in light of the of the dictates of Ring v. Arizona, it necessarily follows that Florida's standard penalty phase jury instructions may no longer be valid and are certainly subject to further analysis under the United States Supreme Court's [Caldwell] holding. In Caldwell, the Supreme Court concluded 'it 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."
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> . . . . . .
>
> Under Florida's standard penalty phase jury instructions, the jury is told, even before evidence is presented in the penalty phase, that its sentence is only advisory and the judge is the final decisionmaker. See Fla.Std.Jury Instr. (Crim.)7.11. The words "advise" and "advisory" are used more than ten times in the instructions, while the members of the jury are only told once that they must find the aggravating factors beyond a reasonable doubt. . . . The jury is also instructed several times that its sentence is simply a recommendation. . . . By highlighting the jury's advisory role, and minimizing its duty under Ring to find the aggravating factors, Florida's standard penalty phase jury instructions must certainly be reevaluated under the Supreme Court's Caldwell v. Mississippi decision.
>
> Just as the high Court stated in Caldwell, Florida's standard jury instructions "minimize the jury's sense of responsibility for determining the appropriateness of death". . . Ring clearly requires that the

> jury play a vital role in determining the factors upon which the sentencing will depend, and Florida's jury instructions tend to diminish that role and could lead the jury members to believe they are less responsible for a death sentence than they actually are. Ring has now emphasized the jury's role in this process and may compel Florida's standard penalty phase jury instructions to do the same.

Bottoson v. Moore, 833 So.2d 693, 731 (Fla.2002) (Lewis, J., concurring in result only) (citations omitted)

Justice Pariente, also concurring in result only in Bottoson, 833 So.2d at 723, agreed with Justice Lewis that Florida's penalty phase jury instructions needed to be reevaluated in light of Ring.

While this Court had previously rejected Caldwell claims and approved the standard penalty instructions [see, e.g. Combs v. State, 525 So.2d 853, 855-58 (Fla.1988)], and continued to do so after Ring [see, e.g. Kalisz v. State, 124 So.3d 185, 212 (Fla.2013)], those holdings were premised on the assumption that Florida's "advisory jury" death penalty scheme was constitutionally permissible. Hurst v. Florida and Hurst v. State have now emphatically established that it isn't. So repeatedly telling the jurors - - as was done here over defense objection (4/797-98; 6/1038; 28/1890-91) - - that their penalty recommendation is advisory; that "[t]he decision as to which punishment shall be imposed rests with me as the Judge of this Court" (29/1937); ". . . [T]he final decision as to which punishment shall be imposed is the responsibility of me as a Judge. As a trial judge that responsibility will fall on me" (29/2043), strongly tends to diminish the jurors' sense of personal responsibility for the life-or-death decision. [Even the penalty phase verdict form was prominently labeled ADVISORY SENTENCE (7/1248)]. Telling the ju-

rors that their recommendation "is an advisory nature and is not binding on the Judge" but would be "given great weight and great deference by the Judge" (29/2043-44) does not cure the basic problem, which is that the jurors are misled about the consequences of their verdict.

D. Sullivan

While this Court rejected Timothy Hurst's argument that the error was "structural" and therefore not amenable to harmless error analysis (while agreeing with Hurst that the error in his case could not be found harmless under the DiGuilio standard because, inter alia, "[w]e cannot determine how many jurors may have found the aggravation sufficient for death", and "[w]e cannot determine if the jury unanimously concluded that there were sufficient aggravating factors to outweigh the mitigating circumstances"), the opinion does not discuss or even mention Sullivan v. Louisiana, 508 U.S.275 (1993). Therefore, Morris respectfully requests that this Court reconsider the "structural error" argument, which is of federal constitutional dimension, in light of Sullivan.

The question of whether a death sentence imposed under the constitutionally invalid Florida scheme is structural error which is not susceptible to harmless error review depends on whether a death sentence based on a nonunanimous jury verdict with no explicit jury factfinding is controlled by the reasoning of Sullivan, or whether it is more like Neder v. United States, 527 U.S. 1 (1999) and Washington v. Recuenco, 548 U.S. 212 (2006). If the position asserted by the state in dozens of cases including Hurst and Perry - - that jury factfinding is only re-

quired as to a single aggravator - - were correct, then Neder and Recuenco would seem to apply. But, as this Court unambiguously concluded in Hurst, 2016 WL 6036978, p.10, n.7, the state's position is not correct. Unanimous jury findings are required as to the existence of each aggravator relied on by the state; that the aggravators are sufficient to warrant a death sentence; that the aggravators outweigh the mitigators; and that a death sentence should be imposed. That being the case, a death sentence imposed without any of the required jury findings is in no way comparable to a jury instruction which omits an uncontested or uncontestable element of an offense [Neder] or a special verdict form which omits an uncontested or uncontestable noncapital sentence enhancement factor [Recuenco]. Instead, the rationale of Sullivan controls.

Justice Scalia's opinion for a unanimous Court in Sullivan begins from the premise that when the defendant has a Sixth Amendment right to a jury trial, the trial judge "may not direct a verdict for the State, no matter how overwhelming the evidence." 508 U.S. at 277. Recognizing that under the Chapman standard most constitutional errors can be evaluated for possible harmlessness in terms of their effect on the factfinding process, Justice Scalia noted that there are other kinds of errors (including the constitutionally deficient reasonable doubt instruction given in Sullivan) which by their nature are simply not amenable to harmless error analysis:

> Chapman itself suggests the answer. Consistent with the jury-trial guarantee, the question it instructs the reviewing court to consider is not what effect the constitutional error might generally be expected to have upon a reasonable jury, but rather what effect it had upon the guilty verdict in the case at hand. See Chap-

> man, supra, 386 U.S., at 24, 87 S.Ct., at 828 (analyzing effect of error on "verdict obtained"). Harmless-error review looks, we have said, to the basis on which "the jury actually rested its verdict." Yates v. Evatt, 500 U.S. 391, 404, 111 S.Ct.1994,1983, 114 L.Ed.2d 432 (1991) (emphasis added). The inquiry, in other words, is not whether, in a trial that occurred without the error, a guilty verdict would surely have been rendered, but whether the guilty verdict actually rendered in this trial was surely unattributable to the error. That must be so, because to hypothesize a guilty verdict that was never in fact rendered - no matter how inescapable the findings to support that verdict might be - would violate the jury trial guarantee. [Citations omitted].
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> . . . . . .
>
> Once the proper role of an appellate court engaged in the Chapman inquiry is understood, the illogic of harmless-error review in the present case becomes evident. Since, for the reasons described above, there has been no jury verdict within the meaning of the Sixth Amendment, the entire premise of Chapman review is simply absent. There being no jury verdict of guilty-beyond-a-reasonable-doubt, the questions whether the same verdict of guilty-beyond-a-reasonable-doubt would have been rendered absent the constitutional error is utterly meaningless. There is no object so to speak, upon which harmless-error scrutiny can operate. The most an appellate court can conclude is that a jury would surely have found petitioner guilty beyond a reasonable doubt-not that the jury's actual finding of guilty beyond a reasonable doubt would surely not have been different absent the constitutional error. That is not enough. See Yates, supra, 500 U.S., at 413-414, 111 S.Ct., at 1989 (SCALIA.J., concurring in part and concurring in judgment). The Sixth Amendment requires more than appellate speculation about a hypothetical jury's action, or else directed verdicts for the State would be sustainable on appeal; it requires an actual jury finding of guilty. See Bollenbach v. United States, 326 U.S. 607,614 66 S.Ct.402,405,90 L.Ed. 350 (1946).

Sullivan v. Louisiana, 508 U.S. at 279-80 (emphasis in opinion)

As was stated in Arizona v. Fulminante, 499 U.S. 279, 307-08 (1991), the common thread which connects the many cases in which constitutional error can properly be evaluated for harmlessness "is that each involved 'trial error' - error which occurred during the presentation of the case to the jury, and which therefore may be quantitatively assessed in the context of

other evidence presented in order to determine whether its admission was harmless beyond a reasonable doubt." Structural error, in contrast, is error which affects "the framework in which the trial proceeds." Fulminante, 499 U.S. at 310; see Sullivan, 508 U.S. at 281. In Sullivan, "the instructional error consist[ed] of a misdescription of the burden of proof, which vitiates all the jury's findings. A reviewing court can only engage in pure speculation - its view of what a reasonable jury would have done. And when it does that 'the wrong entity judge[s] the defendant guilty.'" 508 U.S. at 281, quoting Rose v. Clark, 478 U.S. 570,578 (1986).

The Sullivan opinion concludes with the recognition that denial of the right to a jury verdict beyond a reasonable doubt

> is certainly an error of the former sort, the jury guarantee being a "basic protectio[n]" whose precise effects are unmeasurable, but without which a criminal trial cannot reliably serve its function, Rose, supra, 478 U.S. at 577, 106 S.Ct., at 3105. The right to trial by jury reflects, we have said, "a profound judgment about the way in which law should be enforced and justice administered." Duncan v. Lousiana, 391 U.S., at 155,88 S.Ct., at 1457. The deprivation of that right, with consequences that are necessarily unquantifiable and indeterminate, unquestionably qualifies as "structural error."

508 U.S. at 282

Under the Hurst analysis, a death sentence based only on a nonunanimous advisory recommendation - - with all of the required findings of fact having been made by the judge - - is a constitutional error (or more accurately a combination of errors) which affected the framework of the penalty trial and resulted in the critical factual determinations being made by the wrong entity. [See also State v. Waine, 122 A.3d 294,300-01 (Md.2015) (dealing with an "advisory-only" jury instruction);

United States v. Ramirez-Castillo, 748 F.3d 205,217 (4th Cir.2014); and Murray v. State, 937 So.2d 277,281-82 (Fla.4th DCA 2006), each finding structural error under the Sullivan v. Louisiana "wrong entity" analysis).

As was pointed out in People v. McGhee, 964 N.E.2d 715,723 (Ill.App.1 Dist.2012), there is a crucial distinction between a defendant's substantive right to a unanimous verdict (which is among the most fundamental of rights), as compared to procedural methods designed to effectuate the substantive right. While the substantive right to a unanimous jury verdict (unless knowingly and voluntarily waived, see Flanning v. State, 597 So.2d 864 (Fla. 3d DCA 1992)) is an indispensable prerequisite to a fair trial, a procedural right (such as polling the jury) may not be. McGhee, 964 N.E.2d at 723-24. In United States v. Curbelo, 343 F.3d 273 (4th Cir. 2003), a juror was taken ill during the trial testimony. Curbelo declined to stipulate to proceeding with eleven jurors, but the trial judge, expressing the belief that he had discretion to do so, allowed the trial to continue and a verdict to be rendered by eleven jurors. On appeal, the Fourth Circuit found that depriving the defendant of a verdict of twelve jurors, without his consent or any finding of good cause, was structural:

> Like other structural errors, the error here has repercussions that are "necessarily unquantifiable and indeterminate." Sullivan, 508 U.S. at 282, 113 S.Ct. 2078. This is particularly true given the rules of evidence and the restrictions that they quite legitimately place on any inquiry into jury deliberations. See generally Tanner v. United States, 483 U.S. 107, 107 S.Ct. 2739, 97 L.Ed.2d 90 (1987). We simply cannot know what [e]ffect a twelfth juror might have had on jury deliberations. Attempting to determine this would involve pure speculation.

The Fourth Circuit in Curbelo noted that its analysis was in accord with precedent:

> Not surprisingly, all of our sister circuits, in considering violations of Rule 23(b), have agreed that such violations require per se reversal and are not subject to harmless error review. For example, in United States v. Essex, 734 F.2d 832 (D.C.Cir.1984), the Court of Appeals for the District of Columbia vacated a defendant's conviction because a trial court excused a juror after deliberations had begun without conducting a specific inquiry into whether dismissal was "necessary" and for "just cause," as required by Rule 23(b). Id. at 834, 842. Eschewing harmless error review, the court of appeals awarded Essex a new trial, explaining that she had been denied "[t]he obvious and substantial right. . . to a unanimous verdict by the jury of 12 who heard her case and began their deliberations." Id. at 844 (emphases in original).

343 F.3d at 283-84 (footnote omitted)

The D.C. Circuit in United States v. Essex, 734 F.2d 832, 841 (D.C.1984), quoting current Supreme Court Justice Anthony Kennedy's opinion for the Ninth Circuit in United States v. Lopez, 581 U.S. 1338, 1341 (9th Cir. 1978) (which, to come full circle, was quoted by this Court in Hurst, 2016 WL 6036978, p.14) explained "The dynamics of the jury process are such that often only one or two members express doubt as to a view held by a majority at the outset of deliberations. A rule which insists on unanimity furthers the deliberative process by requiring the minority view to be examined and, if possible, accepted or rejected by the entire jury. The requirement of jury unanimity thus has a precise effect on the factfinding process, one which gives particular significance and conclusiveness to the jury's verdict". 734 F.2d at 841. The appellate court in Essex said:

> This reasoning applies with equal force to a situation where, as here, a juror has absented himself for no valid reason: in both cases there is a danger that dissenting views may not be heard, debated, and resolved by the process of arriving at a unanimous verdict. The

> requirement of unanimity for a verdict in a criminal case "is inextricably interwoven with" the standard of proof beyond a reasonable doubt. Hibdon v. United States, 204 F.2d 834, 838 (6th Cir.1953) ("there cannot be a verdict supported by proof beyond a reasonable doubt if one or more jurors remain reasonably in doubt as to guilt"). The requirement of unanimity would lose a great deal of its force if, as the dissent implies, jurors may opt out at will. Permitting this erosion would lessen the prosecution's burden of convincing the entire membership of the jury. The record here cannot support a conclusion that appellant waived her right to a unanimous verdict. We accordingly rule that her right to a unanimous jury verdict was violated.

If an 11-0 verdict, when the defendant is entitled to a jury of twelve, is a constitutional deprivation which amounts to structural error because there is no way to determine the effect upon deliberations of the absence of the twelfth juror, then it necessarily follows that a death sentence based on a 10-2 verdict, when a unanimous verdict is required to impose a death sentence, is even more clearly structural error. If the jurors had been instructed that a death recommendation needed to be unanimous, the dynamics of their deliberations, the length of their deliberations, and the content of their deliberations would almost certainly have been different, and the outcome might well have been a life recommendation.

For a reviewing court to affirm a death sentence on a "harmless error" theory, by substituting itself for the two jurors who voted for life, and speculating what findings "reasonable" jurors would have made, would be tantamount to a prohibited directed verdict of death. Sullivan. See also Woldt v. People, 64 P.3d 256, 269-70 (Colo.2003)(recognizing that it is inappropriate for a reviewing court to assume a factfinding role).

E. Reversal is Required

Four days ago this Court, by a 5-2 vote, found Hurst error to be harmless in a double homicide with six and seven aggravating factors and 12-0 jury death recommendations, saying "The unanimous recommendations here are precisely what we determined in Hurst to be constitutionally necessary to impose a sentence of death." Davis v. State, case no. SC11-1122, Nov. 10, 2016, slip opinion, p. 67-68 (emphasis supplied). Morris' case presents the opposite scenario.

Whether employing the Florida harmless error standard of DiGuilio, the federal constitutional harmless error standard of Chapman, or the structural error analysis of Sullivan, this Court cannot measure the impact of the combination of Hurst errors in this single-aggravator case which resulted in an invalid, nonunanimous death recommendation which the jurors believed was advisory. Nor can the Court determine beyond a reasonable doubt that the Hurst errors could not have affected the jury's deliberations or their verdict. Dontae Morris' death sentence imposed under the unconstitutional statutory scheme must be reversed.

[CONCLUSION] Based on the foregoing argument, reasoning, and citation of authority, appellant respectfully requests that this Court reverse his conviction and death sentence for a new trial [Issues I, II, and III]; reverse his death sentence with directions to impose a sentence of life imprisonment without parole [Issues V and VI]; and/or reverse his death sentence for a new jury penalty trial [Issues IV and VI].

CERTIFICATE OF SERVICE

I certify that a copy has been e-mailed to the Office of the Attorney General at Capapp@myfloridalegal.com, and to Assistant Attorney General Marilyn Muir Beccue at Marilyn.beccue@myfloridalegal.com, on this 14th day of November, 2016.

CERTIFICATION OF FONT SIZE

I hereby certify that this document was generated by computer using Microsoft Word with Courier New 12-point font in compliance with Fla. R. App. P. 9.210 (a)(2).

Respectfully submitted,

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