Filing # 53531234 E-Filed 03/09/2017 04:00:28 PM

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

REPLY BRIEF OF APPELLANT

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RECEIVED, 03/09/2017 04:03:30 PM, Clerk, Supreme Court

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ISSUE I (CHANGE OF VENUE). The state presents its argument as if this were a run-of-the-mill change of venue case. It is anything but.

In Issue IV, which concerns the introduction in the penalty phase of the dash cam video showing the murders of Officer Curtis and Officer Kocab, the state says "There is no evidence in the record that any of the jurors who considered Appellant's sentence had heard of the officers' murders or that they associated Appellant with them. These concerns were address[ed] and allayed during jury selection" (State's answer brief, hereinafter referred to as SB, p.64)(emphasis supplied).

No they weren't. Neither the prospective jurors as a group nor any individual juror were asked if they remembered the murders of Officers Curtis and Kocab, or if they had formed any opinions based on the media coverage of that case, or whether they could put such opinions aside and determine their guilt and/or penalty verdicts based solely on the evidence presented in court. The jurors were just asked if they knew anything about Dontae Morris, Derek Anderson, or Cortnee Brantley. The inability of the voir dire process - - due to the improvident granting of the state's motion asking the trial judge to reconsider his decision to change venue - - to "address and allay" concerns about the impact on jurors of the massive and emotionally charged media coverage of the murders of the two police officers is the most compelling reason why voir dire in this unique situation was wholly inadequate to preserve Morris' right to an impartial jury. Unique because it combines a low-profile charged homicide (one which contained no aggravating factors

pertaining to that crime itself, but only the "prior conviction of violent felonies" aggravator based on later-committed crimes) with an extraordinarily high-profile subsequent double homicide (which the jury could not know about during the guilt phase, but which was to become the visceral focus of the penalty phase).

Very few of the prospective jurors recognized the names of Derek Anderson or Cortnee Brantley. On the other hand, nearly half of the prospective jurors, when they heard the name Dontae Morris, immediately made the connection with the shooting of the two police officers. These jurors were (appropriately) excused - - without inquiry into what they had read or heard, whether they had formed an opinion as to guilt or penalty, or whether they could set aside such opinion - - because the trial judge recognized that knowledge of the officers' murders would be so irreparably prejudicial that there would be no sense even having a trial (13/61,64,75).

Then, within a few days (but while jury selection was still in progress), fifteen more jurors who did not initially make the connection between the name Dontae Morris and the murders of the police officers now remembered it - - either spontaneously or through conversations or by exposure to new media coverage. They, too, were then summarily excused.

The state, by omission and bland portrayal, tries to downplay the intensity, the inflammatory nature, and the sheer amount of the publicity in the Tampa media market generated by the murders of Officers Curtis and Kocab (see SB 32-33). [Actually, the highly emotional print media coverage (see reconstructed record Addition, volumes 1 and 2, and supplemental rec-

ord, volume 1) which is summarized in Morris' initial brief, p. 16-23, is only the tip of the iceberg, since a paper record cannot capture the visual and aural impact of television and radio coverage, nor the interactive component of Internet publicity]. In light of the overwhelming and highly emotional publicity surrounding the Curtis/Kocab murders and the ensuing manhunt (described by the prosecutor as "the single largest manhunt in Tampa Bay area history" (2/260)), and the level of community outrage and fundraising efforts on behalf of the victims' families, it defies reality for the state to suggest that only those jurors who immediately recognized the name Dontae Morris would remember - - when prompted at the outset of the penalty phase - - the murders of Officers Curtis and Kocab. If (as the prosecutor had argued in support of his motion to reconsider the change of venue) memories fade after five years, memories can also come flooding back, especially when something is said or done to refresh those memories. See Nelson v. State, 781 P.2d 994,997 (Alaska App.1989)("It is difficult to question a juror about his or her exposure to prejudicial material without running the risk of further prejudicing the juror. A juror who has been exposed to inflammatory material, but indicates that he or she cannot remember this material, may find his or her memory refreshed during the course of the trial").

Here, the penalty phase was the time bomb. Once 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), jurors who had been exposed to the publicity in 2010 but whose memory had faded were very likely

stunned when the connection was finally revealed; as in "Omigod, he's that guy!" Memories and emotions would be further stoked when the prosecutor showed the jury the dash cam video of the officers' murders as they occurred. [Juror Nickerson provides an instructive example. She did not initially recognize Morris' name, but after a day or two it kind of dawned on her; she now recalled not only the police officers' shootings but also that the event was recorded on the dash cam (16/437-39). If a prospective juror's memory can refresh itself spontaneously, then actual jurors' memories could certainly be refreshed when they heard the prosecutor say "murdered police officers David Curtis and Jeffrey Kocab" and "traffic stop", and when they saw the shootings as they happened on the dash cam video].

As a consequence of the trial court's eleventh-hour granting of the state's misguided motion to reconsider the previously granted change of venue, Morris was sentenced to death on the basis of a 10-2 jury death recommendation [see Issue VI, infra], where the only aggravating factor was "prior convictions of violent felonies" based on the later-occurring Curtis/Kocab murders and the later-occurring Rodney Jones robbery and murder, and where the voir dire process was wholly inadequate to ensure that the jurors could set aside any opinions they had formed as a result of the publicity surrounding the Curtis/Kocab case. Contrary to the state's arguments in support of its motion below, and contrary to its similar arguments on appeal, voir dire in this case could not ensure Morris' right to an impartial jury.

As recognized in Morgan v. Illinois, 504 U.S. 719, 729-30(1992), an important part of the right to an impartial jury is

an adequate voir dire to identify unqualified jurors. See also 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). Because, in the instant case, there was no opportunity for defense counsel to obtain even the most basic information about jurors' exposure to the Curtis/Kocab media coverage, or whether they had formed any opinions or whether they could set those opinions aside, counsel was effectively precluded from challenging any biased jurors for cause or from intelligently exercising his peremptory challenges. If the jurors spontaneously connected the name Dontae Morris with the police officers, they were gone; but as to any juror who did not spontaneously make that connection, defense counsel was flying blind. Under these circumstances, the fact that defense counsel (as the state puts it) "did not exhaust his peremptory challenges in search of an impartial jury" (SB 37) in no way supports the state's claim below and on appeal that a change of venue was unnecessary.

If the state had simply left well enough alone the constitutional error could have been averted. Instead, as Judge Fuente said to the prosecutor, "We are doing it here because of you" (17/555). The state's tactical decisions, like those of the defense, have serious consequences [see Pepitone v. State, 846 So.2d 640,642 (Fla.2d DCA 2003)], and the consequence of the prosecutor's successful effort to persuade the judge to reconsider the previously granted change of venue should be reversal

for a new trial and (if necessary) penalty phase before an impartial jury.

ISSUE II (THE "I REPENT FOR KILLING" STATEMENT, AND THE EXCLUSION OF DR. MCCLAIN'S TESTIMONY CONCERNING MORRIS' MENTAL CONDITION WHEN HE MADE THAT STATEMENT)

As to the first part of this Point on Appeal (introduction of the "I repent for killing" statement), Morris will rely on his initial brief.

A. Proffer

With regard to the second part of the issue, which raises a constitutional challenge to the exclusion of the expert testimony of Dr. McClain regarding Morris' mental condition at the time he made the "I repent for killing" statement, the state contends that defense counsel's supposed failure to provide a proffer of Dr. McClain's testimony "compels rejection of this claim as unpreserved." (SB 20,40-41).

The twin purposes of requiring a contemporaneous objection to preserve an error for appellate review are (1) to apprise the trial judge of the putative error and give him an opportunity to correct it, and (2) to provide a record for intelligent review on appeal. See, e.g. Castor v. State, 365 So.2d 701,703 (Fla.1978); Kaczmar v. State, __So.3d__ (Fla.2017)[2017 WL 410214]; State v. Wiley, __So.3d__ (Fla.2017)[2017 WL 526510]. More specifically, "[t]he purpose of a proffer is to put into the record testimony which is excluded from the jury so that an appellate court can consider the admissibility of the excluded testimony." Jacobs v.

Wainwright, 450 So.2d 200,201 (Fla.1984); Blackwood v. State, 777 So.2d 399,411 (Fla.2000); see also Rozier v. State, 636 So.2d 1386,1387 (Fla. 4th DCA 1994); Fehringer v. State, 976 So.2d 1218,1220 (Fla. 4th DCA 2008). For example, in Blackwood, 777 So.2d at 410-411, cited by state at SB 41, it was contended on appeal that the trial judge erred in refusing to admit three reports by a Dr. Garfield, but "[t]he reports at issue were never made a part of the record . . ., nor were the contents ever proffered to the [trial] court."

In the instant case, in stark contrast, Dr. McClain's expert opinions (and the basis for those opinions) concerning Morris' mental condition at the time he made the "I repent for killing" statement were proffered to the trial court and have been made part of the record on appeal (3/454-526; see 3/450-52). While presentation of this issue is somewhat complicated by its being common to all three of Morris' trials, the fact remains that 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 form the jury trial the expert testimony of Dr. McClain. The defense, citing Crane v. Kentucky, 476 U.S. 683 (1986), specifically contended 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).

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] had further considered defense counsel's well-reasoned memorandum of law" (6/1105)(emphasis supplied).

Nevertheless, the trial judge ruled adversely, based on conclusions which Morris submits were flatly inconsistent with the constitutional principles of Crane v. Kentucky, and also inconsistent with Florida case law such as Palmes v. State, 397 So.2d 648,653 (Fla.1981) and Dawson v. State, 20 So.3d 1016,1020 (Fla. 4th DCA 2009). See Part B, infra.

So all of the purposes of a proffer were accomplished. The judge read and considered Dr. McClain's expert opinions as to Morris' mental state, and he precluded the defense from introducing her testimony before the jury to challenge the credibility of Morris' "I repent for killing" statement. The judge was afforded every opportunity to rule consistently with Crane, but his ruling went the other way. Dr. McClain's deposition is part of the record on appeal (as are the jail observation notes upon which - - along with an interview with Morris - - she based her opinions), so this court can readily determine whether the trial court's ex-

clusion of her expert testimony was correct or incorrect. See Jacobs v. Wainwright; Blackwood; Rozier; Fehrigner.

What exactly is it that the state thinks defense counsel should have done differently? See Minus v. State, 901 So.2d 344,348 n.1 (Fla.4th DCA 2005)("Although the state's brief argues that evidence was not proffered, the record contains the deposition of T.B. in which she readily admits a continuing sexual relationship, giving details similar to what Minus testified to"). Depositions are frequently provided to trial courts as proffers. See, e.g., Cowins v. Landmark Learning Center, 885 So.2d 421,422-23 (Fla. 1st DCA 2004)(claimant proffered the deposition testimony of Dr. Burak; appellate court reversed, finding that Dr. Burak's testimony was not cumulative and its exclusion was not harmless); see also M.B. v. S.P., 124 So.3d 358,361 (Fla.2d DCA 2013); R.J. Reynolds Tobacco Co. v. Mack, 92 So.3d 244,246 (Fla.1st DCA 2012); JVA Enterprises v. Prentice, 48 So.3d 109,112 (Fla.4th DCA 2010); Thomas v. State, 28 So.3d 240,243 (Fla. 4th DCA 2010); Camus v. Manatee County School Board, 923 So.2d 1266,1267 (Fla.1st DCA 2006); Mitchell v. South Florida Baptist Hospital, 805 So.2d 80,82 (Fla. 1st DCA 2002). Should a defense attorney, in order to preserve an issue, be required to set an evidentiary hearing and, to the inconvenience of all concerned and incurring increased expert witness fees, present the witness' live testimony which would essentially repeat her deposition testimony? No such requirement exists, and the state has presented no authority and no logical reason for inventing one.

B. Merits

After considering Dr. McClain's deposition and diagnosis and defense counsel's "well-reasoned memorandum of law", the trial judge excluded Dr. McClain's expert testimony on the basis that he [Judge Fuente] "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). Judge Fuente also erroneously concluded "that [Morris'] mental state at the time he uttered the statement is not relevant" (6/1106)[see Crane; Palmes; Dawson to the contrary], and that:

> 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.

(6/1107; see also SR 208)

He reiterated:

> 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)(emphasis supplied)

Undersigned counsel for Morris completely agrees with one (and only one) of Judge Fuente's observations: "Such an assessment is for the jury." That is why his previous comment - - that he did not perceive that Morris' mental state rendered his "I repent for killing" statement unreliable - - is so problematical. Judge Fuente was not the trier of fact regarding the credibility of Morris' statements, the jury was. Crane v. Kentucky; Palmes;

Dawson. In the last of these decisions, the appellate court wrote:

> 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)(first emphasis in Palmes quote was added in Dawson opinion; second emphasis supplied by undersigned counsel).

[Also odd is the trial judge's rationale for why he didn't perceive that Morris' mental condition rendered his statements unreliable, "given the specificity of what he said in some of the statements" with regard to the charged offenses. There was only one statement - - "I repent for killing 5 people" (redacted to "I repent for killing" - - which even arguably referred to any or all of the charged crimes, and there was nothing specific about it].

As far as the judge's assertion that expert (or lay) testimony concerning an accused's mental state is irrelevant and inadmissible "absent evidence of the affirmative defense of insanity at the time of the offense" - - an assertion echoed by the state

in its answer brief (SB47-49) - - that is true only when the expert's opinion goes to the defendant's mental state at the time of the offense. For example, in Kight v. State, 512 So.2d 922,929-31(Fla.1987), relied on by the state (SB 48-49), this Court said:

> We cannot agree with the appellant that the testimony he sought to elicit from Detective Weeks concerning his mental capacity was admissible as a circumstance surrounding his confession. Unlike the defendants in Crane and Palmes Kight did not seek to introduce this evidence in an attempt to cast doubt on the credibility of his confession. To the contrary, Kight's main objective in getting the evidence of his mental condition before the jury was to bolster the credibility of his story that Hutto did it. We do not read the Crane decision to require evidence of a defendant's mental capacity under circumstances such as these. Further, it does not appear to us that testimony which the defense sought to elicit from Detective Weeks was relevant to the circumstances surrounding the confession.

(emphasis supplied)

In the instant case, in contrast, Dr. McClain's testimony was sought to be introduced to cast doubt on the credibility of the "I repent for killing" statement, and she offered no opinion concerning his mental state at the time of the crime. So the controlling cases are Crane and Palmes; not Kight. The fact that diminished capacity is not a defense to a crime in Florida [see, e.g., Chestnut v. State, 538 So.2d 820 (Fla.1989)] has nothing to do with the issue in this case.

The state (1) thoroughly misunderstands the holding of Crane v. Kentucky; (2) ignores the case law from numerous jurisdictions applying Crane to recognize the admissibility and potentially crucial importance of expert psychiatric or psychological testimony to challenge the credibility of a defendant's confession or

statement; and (3) points to no authority to support its own assertions. The state says:

> Crane does not stand for the proposition that expert or lay testimony regarding a declarant's state of mind or mental condition must be admitted. Instead, it stands for the proposition that even where there is a pretrial ruling regarding voluntariness, the jury is permitted to reach its own conclusions as to whether the statement was voluntary, credible, and reliable and what weight to afford it.

(SB 20-21,43)

While it is certainly true that the reliability and credibility - - or lack thereof - - of a confession or inculpatory statement is for the jury (see Judge Fuente's order, 6/1107) even where there is a pretrial ruling regarding voluntariness, that long-accepted principle is the backdrop of Crane, not its holding. 476 U.S. at 688 ("the requirement that the [trial] 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 supplied). If the accused has a right to challenge the reliability of his statement before the jury, it follows that he has a right to present evidence to support that challenge, and that was the issue in Crane. The Court observed that:

> . . . [T]he 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 or otherwise . . . . unworthy of belief." Lego v. Twomey [404 U.S. 477,485-86, 92 S.Ct.619,624-25(1972)] 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 pre-

> viously admit his guilt? 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

For these reasons, the trial court's ruling precluding the defense from introducing evidence bearing on the circumstances in which Crane's confession was obtained was a violation of due process. Crane, 476 U.S. at 687-91.

The Supreme Court in Crane reversed the state appellate court's decision upholding the trial court's exclusion of evidence "[b]ecause the reasoning of the Kentucky Supreme Court is directly at odds with language in several of this court's opinions . . . and because it conflicts with the decisions of every other state court to have confronted the issue", citing as an example this Court's decision in Palmes v. State, 397 So.2d 648,653 (Fla.1981). [Palmes recognizes, inter alia, that the defendant's state of mind is relevant to the question of what weight the jury should accord to his confession or statement].

To the extent that the state is saying that Crane does not expressly hold that expert testimony regarding the defendant's mental condition at the time of his confession or statement is admissible, the state is correct. However, the exclusion of such expert testimony was found to be reversible error in Dawson v. State, supra, 20 So.3d at 1020, relying on Palmes v. State, supra, 397 So.2d at 653. Moreoever, appellate courts in many other jurisdictions (including Kentucky), relying on Crane, 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 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); Holloman 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); People v. Hamilton, 415 N.W. 2d 653,653-56 (Mich.App. 1987)

In the Holloman case the Kentucky Supreme Court held that the trial judge committed reversible error by excluding the expert testimony of a clinical psychologist, Dr. Wagner, which was offered to demonstrate that Holloman's confession was not credible.

> Crane v. Kentucky, supra, is dispositive. Here, as in Crane, even though the issue of voluntariness had been ruled upon, Holloman also had the constitutional right to a fair opportunity to persuade the jury that his statements were not credible and should not be believed. His proffered expert testimony should not have been excluded on the basis of relevancy because it was permissible evidence bearing directly on the reliability of his statements. The stated reasons offered by the trial judge for excluding the testimony were not sufficient.

37 S.W.3d at 767.

Not only does the state misconstrue Crane and ignore the decisions which apply it in the context of expert testimony, the state is unable to provide any controlling or persuasive authority from any jurisdiction to support its position that the constitutional principles and reasoning of Crane should not apply to expert testimony. All the state can say - - as did the judge below - - is that credibility and reliability of a confession or

statement is for the jury. And that is exactly why the jury should not have been precluded from hearing relevant testimony bearing on that issue.

C. Harmful Error

The state's superficial harmless error argument (SB 49) is inconsistent with the standards of State v. DiGuilio, 491 So.2d 1129 (Fla.1986), and Chapman v. California, 386 U.S. 18 (1967). The state says:

> Appellant essentially complains that the court did not let him present an expert that would have revealed that Morris admitted to being a child molester and found Appellant to be delusional when offering what otherwise appeared to be sincere statements of religious faith. Appellant's identity was well established by the other evidence presented at trial, and any error in this ruling could not have affected the jury's verdict.

(SB 49)

As DiGuilio makes clear, the standard for harmless error "is not a sufficiency-of-the-evidence, a correct result, a not clearly wrong, a substantial evidence, a more probable than not, or even an overwhelming evidence test." 491 So.2d at 1139. Nor is it a "well established by the other evidence" test. The focus is on the effect of the error on the trier-of-fact; i.e., whether it could have played a role in the jury's deliberations or contributed to its verdict; and the burden is on the state - - as beneficiary of the error - - to show beyond a reasonable doubt that the error could have had no impact. DiGuilio. Since the error here was the exclusion of evidence offered to show that Morris' "I repent for killing" statement was unreliable and the product of his mental illness, the DiGuilio standard requires the state

to show on appeal that the "I repent for killing" statement was relatively unimportant to their case and would not have been relied on by the jury as a reason to convict Morris of first-degree murder. The trial prosecutor - - in contrast - - thought the statement was very important, and he argued to the jury that it was 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)

The prosecutor fought hard and successfully to get the "I repent for killing" statement before the jury; fought equally hard and successfully to prevent the jury from hearing Dr. McClain's testimony offered by the defense to challenge the statement's reliability; and told the jury that the statement, in and of itself, amounted to proof of Morris' guilt beyond a reasonable doubt. The state's contention on appeal that neither the damaging evidence it introduced, nor the defense evidence it persuaded the trial court to exclude, could have affected the jury's verdict should be taken with a pillar of salt.

The "other evidence presented at trial" which, according to the state, "established Appellant's identity" consisted of circumstantial evidence and the heavily impeached testimony of Ashley Price. Ashley Price's credibility, or lack thereof, was the most vigorously disputed aspect of this trial. See Morris' ini-

tial brief, p.56-59. The "I repent for killing statement" (especially in light of the prosecutor's closing argument) could easily have been the crucial factor in either (1) convincing the jury that Ms. Price's testimony was truthful, or (2) convincing the jury that Morris was guilty even if the jury disbelieved or had doubts about Ms. Price's testimony. Therefore, the trial court's constitutional error preventing the defense from introducing expert mental health evidence to challenge the reliability of the "I repent for killing" statement was anything but harmless.

Finally, the state's loaded comment that "Appellant essentially complains that the court did not let him present an expert that would have revealed that Morris admitted to being a child molester and found Appellant to be delusional when offering what otherwise appeared to be sincere statements of religious faith" (SB 49) should be examined. The state appears to be making a "careful what you wish for" argument, assuming that if the defense had been permitted to introduce Dr. McClain's testimony it would have backfired, so in effect the state did him a favor by persuading the judge to exclude it. That assumption is nothing but self-serving speculation on the state's part. If Morris, in the midst of his wild rantings, "admitted" to being a "young buck child molester" (SR 177), then he also "admitted" to giving his whole bloodline AIDS even though he doesn't have AIDS (SR 154). The state suggests that the jury would have disregarded Dr. McClain's opinion that Morris was delusional because he was "offering what otherwise appeared to be sincere statements of religious faith" (SB 49). However, as Dr. McClain explained in her deposition and would have explained to the jury, sincerity and

mental illness are not mutually exclusive (3/521, see 502-05). ". . . 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 observation in a psych unit" (3/505).

Dr. McClain's expert opinion was that, at the time of the "I repent for killing" statement and his other documented statements and behaviors, Morris was experiencing a very severe depression with psychotic features (3/495-96,498,518,520). His "sincere statements of religious faith" included remarks that the Voodoo was trying to kill him; that his little brother had put Voodoo on him to die and go to Hell; and "I rebuke the Voodoo in Jesus' name" (SR 152-53). He kept talking about religion in the context of how the world was out to get him (SR 153); the guards were trying to rape him, his little brother was trying to have him killed, the deputies were trying to kill him (SR 153, see 142-43, 153-55). He was constantly pacing back and forth in his cell, singing, talking to himself, picking at his nails and feet, twisting his hair and his beard. Voices were telling him he had AIDS (SR 143) and that the evening shift was going to rape him until he kills himself (SR 155). While talking to himself, he mentioned the name Dred as if that were the person he was speaking to (SR 168). About twenty minutes after the "I repent for killing" statement, he was saying "Jesus is here. Jesus is coming to get me. I appreciate it. I appreciate it. I appreciate it." (SR 178). Next morning he was observed mumbling incoherently to himself and repeatedly flailing his arms and legs; when he finally stopped he looked at the wall and said they are still

sending the evil spirits at him; he keeps shaking them off and they keep sending them (SR 181).

Whether Morris was delusional when he made the "I repent for killing statement", or whether he was simply experiencing religious repentance, was a critical question for the jury (not the trial judge and certainly not the state's appellate counsel) in determining whether the statement was reliable, and what - - if any - - weight to give it. Dr. McClain's testimony was relevant and admissible for this purpose, and the trial judge erred by excluding it [Crane v. Kentucky], based on his own conclusion that the statement was reliable (6/1106) and based on inapposite case law dealing with diminished capacity (6/1107; SR 208). The error was not harmless.

ISSUE III (PROSECUTORIAL MISCONDUCT)

A. Personal Opinion, Vouching, and Matters Outside the Evidence

The state, as anticipated, contends that the prosecutor's arguments were fair comment based on the evidence, and that it was all proper rebuttal to defense counsel's attack on Ashley Price's credibility (SB 21-22,53-62). The state denies that the prosecutor engaged in improper bolstering "as he did not suggest that Appellant is guilty based on information known to him and not presented in court" (SB 21, see 57-58). The state correctly notes that "[i]mproper prosecutorial vouching for the credibility of a witness occurs where the prosecutor 'implicitly refers to information outside the record' or suggests that he or she has reasons to believe the witness that were not presented to the ju-

ry" (SB 57). The state then asserts that "[n]one of the prosecutor's comments in this case crossed that line" (SB 58).

The state is wrong about that. The only evidence of a motive in this case, and the only evidence of collateral criminal activity by Morris, came from the testimony of Ashley Price, whose credibility or lack thereof was the focal point of the trial. According to Ashley Price, Morris told her that earlier on the day of the murder he had gotten into an argument with Derek Anderson about selling marijuana in the apartment complex which Morris considered to be his "turf". Neither Ashley, nor any other witness or evidence at trial, suggested that Dwayne Callaway (Morris' stepbrother) nor Javonte Dennard (Morris' cousin) were in any way involved in selling marijuana, or any other drug or criminal activity, with or without Morris. Ashley Price knew Javonte Dennard (nicknamed Pedro) because he was her sister Tiffany's boyfriend. Ashley did not even know Dwayne Callaway.

Nevertheless, while playing the audio of the jail phone call and giving the jury his running commentary (which, as undersigned counsel explains in his initial brief, amounted to a translation), the prosecutor paused the recording and 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 you to 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. <u>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.</u> 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, the prosecutor was at least implicitly, and very nearly explicitly, referring to information (whether true or false) outside the record and suggesting that he had reasons to believe Ashley Price which were not presented to the jury. The prosecutor conveyed to the jury that he knew something which they (previously) did not know; that Morris' brother, his cousin, and Ashley's sister were underlings in a drug enterprise run by Morris. The jurors had heard no evidence of this, so the logical inference was that the prosecutor knew it from his own or law enforcement's investigation of this case; or from Callaway's, Dennard's, or Tiffany Price's involvement in other criminal cases. By this grossly improper comment, the prosecutor (1) portrayed Morris as a higher level and more insidious drug dealer than what Ashley Price's testimony (if believed by the jury) would have established, and (2) intentionally put a much darker spin on the phone call than was warranted by any actual evidence.

The state tries to justify the prosecutor's tactics on a quid pro quo theory that his comments that Ashley Price was credible were fair rebuttal to defense counsel's arguments challenging Ashley's credibility. The flaw in the state's contention is that defense counsel's arguments against Ashley's credibility were based on evidence, while many of the prosecutor's assurances that Ashley was credible were based on his own opinion. For example, the state says in its brief:

> The State presented its argument in response to defense counsel's argument that Appellant was not try-

> ing to "silence" Ms. Price, but rather, he was trying to get her to tell the truth. The prosecutor pointed out to the jury tenor of Appellant's statements, the inflection of his voice, the words he used to express himself, and the fact that he knew he was being recorded. The prosecutor properly argued that this evidence, when taken in context, shows not a man seeking the truth, but a man attempting to intimidate a witness.

(SB 22; see 61)

Defense counsel's argument was not only based on evidence; it was based on evidence introduced by the state. Four times during the phone conversation with his brother and cousin, Morris said he just wanted Ashley Price to tell his attorney the truth (23/1546,1548,1560,1566). [Indeed, that may well have been the reason defense counsel did not move to exclude the audiotape]. The prosecutor, in contrast, was arguing without an evidentiary basis that Morris was speaking in code, and that he meant the opposite of what he said. There was no evidence that "you smell me?" is a phrase used by Morris when he means the opposite of what he says [In fact, he used that phrase seventeen times in the phone conversation, in a variety of contexts], and no evidence that "you smell me?" has that meaning in Morris' community or subculture. There was no evidence that Dwayne Callaway or Javonte Dennard or Tiffany Price were underlings of Morris' in a drug enterprise. There was only the prosecutor's extra-record assurances of these "facts", and the jurors would naturally assume that he would know. 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 United States v. Garza, 608 F.3d 659,663 (5th Cir.1979).

> 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 v. State, 743 So.2d 1,4 (1999)(quoting Garza and Hall v. United States, 419 F.2d 582 (5th Cir.1969).

As far as the "tenor of Appellant's statements", "the inflection of his voice", and "the words he used to express himself" (see SB 22,61), it is certainly true that the three males in the phone conversation speak in a street slang and intonation, littered with profanity. It is the kind of speech commonly associated with hard-core or "gangsta" rap music, and it is safe to assume that it would be off-putting to many jurors. But it is equally true that many people (mostly young, often but not exclusively African-American) speak that way, especially among themselves, and it is not evidence of witness intimidation or drug gang activity. In the instant case it was the prosecutor's personal translation of the taped conversations - - his unsworn "expert witness" testimony [see Ruiz, 743 So.2d at 4] - - which gave it those meanings.

In Norman v. Gloria Farms, Inc., 668 So.2d 1016 (Fla.4th DCA 1996), the appellate court in a civil case reversed due to attorney misconduct in closing argument which reached the level of fundamental error, and condemned the "malady" of improper references by lawyers to matters outside the record. The court re-

jected the contention that the defendant's attorney's use of this tactic could "by any stretch of the imagination" be deemed a fair response to the opposing side's tactics, noting that "plaintiff's counsel did not engage in misconduct during closing argument and, in fact, did nothing to prompt the improper comments." 668 So.2d at 1022.

The state, in its brief, cites Judge Farmer's dissenting opinion in Norman v. Gloria Farms for the proposition that closing argument "is a time for robust, vigorous, challenging . . . of an opponent's ideas" (SB 50). Undersigned counsel for Morris agrees with the state and Judge Farmer on this point. The full quote, which is even better, reads:

> I do not think that fundamental error should be used by appellate judges like officious schoolmasters whose personal taste in closing argument is for disputation that would not offend even the fragile sensibilities of a Victorian cleric. For me, closing argument in civil cases is a time for robust, vigorous, challenging, unrestrained skewering of an opponent's ideas. For me, closing argument is not a time for the timid, elliptical discourse of Thomistic scholars.

668 So.2d at 1032 (Farmer, J., dissenting)

However, the problem with Mr. Harmon's argument in the instant case was not that it was "robust", "vigorous", or colorful, but that it was replete with his opinions, name calling, burden-shifting, vouching, and insinuations of personal knowledge outside the evidence. These improprieties, which permeated his opening and closing statements, would deprive a litigant of a fair trial even in a civil case, and all the more so in a criminal trial where a prosecutor is heled to a higher standard of conduct. See Craig v. State, 685 So.2d 1224,1229 (Fla.1996), quoting Berger v. United States, 295 U.S. at 88; see also Ruiz v.

State, 743 So.2d at 4 and 8-9; Cardona v. State, 185 So.3d 514,516,520 (Fla.2016); Rodriguez v. State, __So.3d__ (Fla. 5th DCA 2017)[2017 WL 548649, p.1 and 4]; Mora v. State, __So.3d__ (Fla.3d DCA 2017)[2017 WL 608287].

Here, after playing the excerpts from the recorded phone call, the prosecutor argued to the jury as if (1) the evidence had established that Morris had attempted to intimidate the witness Ashley Price, and (2) that such witness intimidation amounted to proof of his guilt of the charged murder of Derek Anderson[1]:

> . . .[W]hen 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)

[1] Note that there was no reference to Derek Anderson, nor to any facts linked to that homicide, in the phone conversation, and that Ashley Price was a potential state witness in four separate cases. There is nothing in the recorded phone call to indicate which case or cases Morris thought Ashley was talking to the police about.

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. <u>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</u>.

(26/1817)(emphasis supplied)

By constantly bombarding the jury with his personal opinions about the meaning of the words and inflections on the audiotape, his extra-record insinuations about the nature of the relationships among the participants in the phone call, and his opinions that Ashley Price was credible and that the jury could be as certain "as night follows day" and "as me standing in front of you" that Morris is guilty, the prosecutor destroyed the fairness of this trial.

B. <u>Other Aspects of the Prosecutor's Misconduct</u>

Because of page limitations, undersigned counsel will only briefly address the state's arguments concerning two other aspects of the prosecutor's misconduct.

<u>Improper Epithets</u>. "Inflammatory labels used by a prosecutor to describe the defendant are improper invitations for the jury to return its verdict based on something other than the evidence and the applicable law. Vituperative or pejorative characterizations of a defendant are not acceptable tools to be em-

ployed by a prosecutor." Rodriguez v. State, supra, 2017 WL 548649, p.2.

Referring to a defendant as a "cold-blooded killer" or a "ruthless killer" is improper. See Urbin v. State, 741 So.2d 411,420 n.9 (Fla.1998); Henry v. State, 743 So.2d 52,53 (Fla. 5th DCA 1999). The state cites no authority to the contrary (see SB 58-60). Describing the defendant to the jury nine times as a "stone cold killer", a "ruthless killer", a "cold blooded killer", and a "ruthless stone cold killer" is nothing short of an effort to dehumanize and demonize the accused. Urbin, at 420 n.9. And "the accused" is the key phrase here because seven of those nine remarks were made in quick succession during the prosecutor's opening statement (21/1222-26), at a time when the jury had not heard any evidence, so the purpose and effect of such name-calling was solely to predispose the jury against Morris and undermine his presumption of innocence. See State v. Couture, 482 A.2d 300,317-18 (Conn.1984); Commonwealth v. Gilman, 368 A.2d 253,258 (Pa.1977); Commonwealth v. Capalla, 185 A.203,206 (Pa.1936).

Burden-Shifting. The prosecutor, plowing through defense counsel's attempt to object on grounds of burden-shifting, twice stated to the jury that there had been no motive suggested through her cross-examination for Ashley Price to fabricate (26/1784-85). The state says on appeal, "the prosecutor did not argue that Appellant should have or could have brought in additional evidence of Ms. Price's lack of credibility" (SB 55). Wrong. That is exactly what the prosecutor suggested by highlighting the fact that her motive to fabricate was not shown on

cross-examination; and that amounts to improper burden-shifting. Bell v. State, 108 So.3d 639,648-49 (Fla.2013). According to the state, the prosecutor was simply "commenting on what was brought into evidence regarding Ms. Price's credibility" (SB 55)(emphasis in state's brief). Again, wrong. The prosecutor's comment was explicitly directed to what was not brought into evidence (i.e., her motive), and suggested that it was the defense's burden to do so on cross-examination. There is a big difference between simply asking the jury to consider what motive a witness would have to lie [see Valentine v. State, 98 So.3d 44,56 (Fla. 2012), relied on by the state at SB 56] and implying that the defense has a burden of proof regarding the witness' credibility (as in Bell and the instant case). See also Lawson v. State, 886 A.2d 876,889-91 (Md.2005); People v. Levandowski, 780 N.Y.S. 2d 713,715(2014). As he did so many times in so many ways in his opening and closing statements, the prosecutor crossed the line.

C. Conclusion

Rule 4-3.4(e) of the Florida Bar's Rules of Professional Conduct states 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. . .

The instant case provides a textbook example of how a prosecutor's failure to abide by these professional standards can destroy the fairness of a jury trial. As in Rodriguez v. State,

supra, 2017 WL 548649, p.4, "[t]he flood of improper prosecutorial comments" in his arguments to the jury "was deep, wide, and unrelenting." This Court should reverse Morris' conviction and death sentence for a new trial.

ISSUE IV (DASH CAM VIDEO). While it is true that a trial judge is afforded substantial discretion in determining whether the prejudicial impact of proffered evidence outweighs its probative value (see SB 62-64), that discretion is not unlimited. See, e.g., Evans v. State, 177 So.3d 1219,1229 (Fla.2015); McDuffie v. State, 970 So.2d 312,326 (Fla.2007). This Court has repeatedly cautioned trial judges that - - while the state in a capital penalty phase may introduce some evidence as to the specifics of a crime for which the defendant has been previously convicted - - 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 such evidence cannot become the feature of the penalty phase. [See cases cited at p. 101-102 of Morris' initial brief].

One accepted method of providing the details of a prior (or, as in this case, subsequent) crime is through the testimony of an investigating officer. As explained in Rodriguez v. State, 753 So.2d 29,44-45 (Fla.2000):

> [i]n the case of prior violent felony convictions, because those details are admissible, it is generally beneficial to the defendant for the jury to hear about those details from a neutral law enforcement official rather than from prior witnesses or victims. In fact, we have cautioned the State to ensure that the evidence of prior crimes does not become a feature of the penalty phase proceedings. See Finney v. State, 660 So.2d

674,683-84 (Fla.1995); see also Duncan v. State, 619 So.2d 279,282 (Fla.1993)(stating that details of prior felony convictions should not be made a feature of the penalty phase proceedings); Stano v. State, 473 So.2d 1282,1289 (Fla.1985)(same).

This Court in Rodriguez reaffirmed its precedent "allowing a neutral witness to give hearsay testimony as to the details of a prior violent felony because it tends to minimize the focus on the prior crime." 753 So.2d at 45 (emphasis supplied).

In the instant case, the state presented testimony of Detective Massucci as to the specifics of the Rodney Jones homicide (29/1950-55), and the testimony of Detective Duran as to the specifics of the murders of Officers Curtis and Kocab (29/1957-62). The state could have gone into more detail with Detective Duran about the circumstances of the actual shootings without necessarily creating undue focus on the subsequent crime. But to show the jury the shocking and emotionally wrenching dash cam video of the police officers' murders as they occurred went way over the line.

ISSUE V (PROPORTIONALITY). In its "Statement Regarding Proportionality", the state says, "Other than as expressed in Issue V, Appellant does not challenge the proportionality of his sentence" (SB 70). Undersigned counsel is unsure what that means, since in Issue V Morris argues that this single-aggravator case with substantial mitigation is neither among the most aggravated nor among the least mitigated of first-degree murders. See Morris' initial brief, p. 107-110.

Winkles v. State, 894 So.2d 842,847-48 (Fla.2005), cited by the state at SB 71, involves four aggravating factors (prior vi-

olent felonies, CCP, avoid arrest, murder committed in the course of kidnapping) and minuscule nonstatutory mitigation. No evidence was presented of any mental health problems. 894 So.2d at 848. The instant case, in sharp contrast, has only one aggravating factor (the subsequently committed violent felonies). 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 (8/1466). The judge expressly found that the weight and quality of the mental mitigation evidence was <u>not</u> diminished by the contrary opinion (on the issue of low intelligence) of the state's expert (8/1466). In addition, nine nonstatutory mitigating factors were accorded moderate weight; these focused on 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 (8/1467-71). This is not one of the most aggravated and least mitigated first-degree murders, and Morris' death sentence should be reversed for imposition of life imprisonment without parole.

ISSUE VI (HURST). This Court has made it clear that when the jury's recommendation of death was not unanimous, the Hurst[2] error cannot be harmless. Johnson v. State, 205 So.3d 1285, 1289-90 (Fla.2016); Mosley v. State, __So.3d__ (Fla.2016) [2016 WL 7406506, p.26]; Simmons v. State, __So.3d__ (Fla.2016)[2016 WL 7406514, p. 6-7]; Williams v. State, __So.3d__ (Fla.2017) [2017 WL 224529, p.17-19]; Kopsho v. State, __So.3d__ (Fla.2017)[2017 WL 224727, p. 1-2]; Armstrong v. State, __So.3d__ (Fla.2017)[2017 WL 224428, p. 1-2]; McGirth v. State, __So.3d__ (Fla.2017) [2017 WL 372095, p.11-12]; Durousseau v. State, __So.3d__ (Fla.2017)[2017 WL 411331, p.5-6]; Hojan v. State, __So.3d__ (Fla.2017)[2017 WL 410215, p. 12]; Dubose v. State, __So.3d__ (Fla.2017)[2017 WL 526506, p.12].

In Kopsho and Durousseau - - as in the instant case - - the jury's vote for death was ten-two. In McGirth and Johnson the jury's vote for death was eleven-one.

Nevertheless, the state asserts that the Hurst error in Morris' case was harmless, indulging in the self-serving speculation that "the jury would have reached a unanimous recommendation of death had it been instructed to do so" (SB 69). Even though there was only a single aggravating factor in this case, and even though the trial judge found (and the jurors certainly could have found) numerous nonstatutory mitigating factors - - nine of which he accorded moderate weight - - in Morris' family background and his "negative and difficult" upbringing, the state invites this Court to substitute its weighing of the ag-

[2] Hurst v. Florida, __U.S.__,136 S.Ct.616(2016); Hurst v. State, 202 So.3d 40 (Fla.2016).

gravators and mitigators for that of the two jurors who believed life imprisonment without parole was the appropriate sentence for the murder of Derek Anderson.

The state's position is refuted by all of this Court's reasoning on the harmless error question after Hurst, in which death sentences have been affirmed based on harmless error only when the jury's death recommendation was unanimous [see Kaczmar v. State, __So.3d__ (Fla.2017)[2017 WL 410214, p.3-5]; King v. State, __So.3d__ (Fla.2017)[2017 WL 372081, p.16-19]] or when the defendant waived a penalty jury [see Davis v. State, 207 So.3d 177, 211-12 (Fla.2016); Mullens v. State, 197 So.3d 16,38 (Fla.2016). In contrast, as explained in McGirth, when the jury's death recommendation was not unanimous:

> We conclude that the State cannot meet [its harmless error] burden. Although the prior violent felony aggravating circumstance was found unanimously by the jury by virtue of McGirth's conviction for attempted first-degree murder of James Miller, whether this aggravating circumstance was "sufficient" to qualify for the death penalty would also be a jury determination. Because the jury vote was eleven to one, there is no way of knowing if such a finding was unanimous. The same rationale applies to the aggravating factor that the murder occurred during the commission of a robbery. Moreover, there is no way of knowing if the jury found any of the other aggravating circumstances unanimously, or if any aggravators that were unanimously found were also unanimously found to be sufficient to qualify for the death penalty.
>
> Further, this was not a case that completely lacked mitigation. McGirth was only eighteen years old at the time of the murder, the bare minimum age to be eligible for the death penalty. See Roper v. Simmons, 543 U.S. 551,568,125 S.Ct. 1183, 161 L.Ed.2d 1 (2005). The trial court gave "significant" weight to this statutory mitigating circumstance. McGirth, 48 So.3d at 784. Additionally, among the evidence that the jury heard in mitigation was that McGirth did not know his father while he was growing up, he was devastated by the death of his grandmother, and he was a witness to domestic violence. As with the aggravators, there is no way to

> know whether the jury unanimously found that any mitigation established during the penalty phase was outweighed by the aggravation.
>
> In sum, any attempt to determine what findings were made by the one juror who voted for life and the eleven jurors who voted for death would amount to speculation, and cannot rise to the level of proof beyond a reasonable doubt. Accordingly, the error in this case cannot be considered harmless.

2017 WL 372095, p.12 (emphasis supplied)

For these reasons, the Hurst error in the instant case cannot be written off as harmless.

[CONCLUSION] Based on the foregoing argument, reasoning, and citation of authority, and that contained in his initial brief, appellant respectfully requests that his 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].

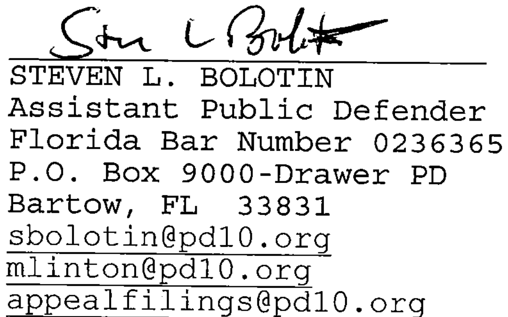
CERTIFICATE OF SERVICE

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 9th day of March, 2017.

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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