

IN THE SUPREME COURT OF FLORIDA

KHALID ALI PASHA, :

Appellant, :

vs. : Case No. SC13-1551

STATE OF FLORIDA, :

Appellee. :

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

INITIAL BRIEF OF APPELLANT

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## STATEMENT OF THE CASE AND FACTS

Khalid Pasha was indicted in September 2002 for the first-degree premeditated murders of his wife, Robin Canady, and step-daughter, Reneesha Singleton (S1/1-4,S38/52-56<sup>1</sup>). He was tried and convicted in 2007, but this Court reversed his convictions in 2010 for a violation his right to self-representation. Pasha v. State, 39 So. 3d 1259 (Fla. 2010). This is a direct appeal from the convictions entered after a retrial in 2013. Judge Kimberly Fernandez sentenced Pasha to death for each count on August 1, 2013 (10-11/1992-2015).

### Events Preceding the 2010 Reversal

Over ten years ago, in November 2003, the trial court appointed Attorney Daniel Hernandez as first-phase counsel and Attorney Brian Gonzalez as penalty-phase counsel for Pasha. (SC08/2/205,208,213,239). Hernandez moved to withdraw in June 2004 at the request of Pasha (SC08/2/250,254), and in August 2004, Judge Tharpe allowed Pasha to discharge his attorneys and represent himself, but the judge appointed Hernandez and Gonzalez to act as standby counsel (SC08/18/149-154). In 2004,

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<sup>1</sup>The original record is cited herein as vol#/pp#; the supplemental record, which includes a corrected trial transcript, as **S**vol#/pp#, and the record in the first appeal, SC08-1129, adopted on June 9, 2014, as **SC08**/vol#/pp#.

Pasha repeatedly moved the court to remove Hernandez and Gonzalez as standby counsel; however, the court denied his requests (SC08/19/167-74, SC08/20/178,185).

Pasha again moved to terminate Hernandez as standby counsel in August 2005, alleging that Hernandez played a role in attempting to hide exculpatory evidence from him (S42/844-851). Attorney Hernandez declined to address the allegations when given the opportunity at the hearing (S60/679). Judge Tharpe granted the motion and terminated the representation of Hernandez on September 8, 2005 (S60/679-80). In his order of January 2006, the judge wrote: "THE Court having been fully advised in the premises . . . DANIEL M. HERNANDEZ, ESQUIRE, is hereby discharged from any further representation as to the Defendant, KHALID ALI PASHA." (S42/889, emphasis added<sup>2</sup>) The order was copied to Hernandez, the State Attorney, and Pasha.<sup>3</sup>

The 2007 jury was instructed on "cold, calculated, and premeditated" (CCP) as an aggravating factor. Seven jurors voted to recommend death; five voted for life in prison (S48/2138-2158). After the jury was discharged, Judge Fuente

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<sup>2</sup> All emphasis is added herein unless otherwise noted.

<sup>3</sup> Judge Timmerman later entered an order allowing Gonzalez to withdraw, and in December 2006, he appointed Attorneys Sinardi and Fraser, who represented Pasha for the trial held in 2007 (43/1176-79, S44/1274).

ruled in his sentencing order of May 2008 that the evidence was insufficient to establish CCP.

The evidence however did not establish beyond a reasonable doubt that he killed each victim with the degree of premeditation required of this aggravating circumstance, specifically, it did not establish that he did so with "heightened premeditation," defined as "deliberate ruthlessness." See *Jackson v. State*, 648 So. 2d 85 (Fla. 1994); *Fennie v. State*, 648 So. 2d 95 (Fla. 1994); *Walls v. State*, 641 So. 2d 281 (Fla. 1987).

\* \* \* \*

Upon independent review of the evidence, the Court finds that the required element of heightened premeditation of this aggravating circumstance is not established beyond a reasonable doubt.

(S48/2147).

**After the 2010 Reversal: Reappointment of Attorney Hernandez**

After this Court's 2010 remand for new trial, Pasha remained determined to proceed pro se, but he requested appointment of standby counsel (1/88). Judge Fuente appointed, first, the Public Defender and, second, Regional Counsel, but both sought and were permitted to withdraw (1/109-110,128-129;S18/111-14). In September 2010, Judge Fuente appointed Attorney Daniel Hernandez, the same attorney who was discharged in 2005, to serve as standby counsel (1/128-129). The record does not reflect that Attorney Hernandez ever informed the trial court that he had been removed from the case by Judge Tharpe in 2005. In October 2010, Pasha noted in his Verified Motion for

Disqualification of Judge Fuente that Hernandez had been previously removed because of conflicts, and that he had no problem accepting Hernandez again, but after he gave Hernandez several motions to file, he feared that Hernandez had undermined his motions by communicating with the judge. (S50/2296-97) As the case progressed, Pasha's complaints about Hernandez increased. (S50/2406-08,2474) In September 2011, Pasha filed a motion to discharge Hernandez as standby counsel. (5/921-23,S50/2448,S27/477-79) In his October 2011 order denying the motion, Judge Fuente stated: "The Court will communicate with Mr. Pasha through Mr. Hernandez and the assigned prosecutor." (5/981)

Later, after Judge Fuente granted a motion for his own disqualification, Pasha moved his successor, Judge Kimberly Fernandez, to reconsider Judge Fuente's order and allow him to terminate Hernandez, but that motion was denied. (6/1180-82;26/449-452;7/1267-68) Pasha repeatedly complained about Hernandez, and Judge Fernandez repeatedly denied Pasha's motions to terminate him. (7/1328-31,1377;27/533-34;29/611-613;30/635-37;31/655-682) When the trial started, Hernandez told the judge that Pasha's Bar grievance was pending against him, but he denied that it was meritorious. (S61/10) Ultimately, Pasha represented himself during the guilt phase of the 2013 trial,

with Hernandez as standby counsel. Attorney Jervis Wise represented Pasha for the penalty phase.

### **Pretrial Motions**

After the 2010 remand, Pasha renewed motions that were heard before the first trial. Judge Fuente considered a "Motion for Rehearing" concerning thirty-two previously filed motions. (3/430-435;15/2-23) An extensive order addressing all the motions was entered on January 7, 2011 (3/489-504). Of particular significance here: **(1)** a motion in limine seeking to preclude and prohibit the introduction of excessively gory photographs was denied as premature (3/492); **(2)** a motion in limine seeking to preclude the State from arguing certain matters, including, inter alia, Pasha's right to remain silent, personal opinion, race, diluting jury's sense of responsibility for deciding appropriate sentence, and that mercy is inappropriate, was granted with the statement: "This Court is confident that no experienced and ethical prosecutor will make any such arguments or comments, which clearly would be improper." (3/494); **(3)** Pasha's motion to bar the death penalty suggesting that the capital sentencing scheme is unconstitutional pursuant to Ring v. Arizona, 536 U.S. 584 (2002) was denied (3/495); and **(4)** Pasha's motion seeking to prohibit the State or the Court from referring to the jury's

role as "advisory" so as to not suggest that the responsibility for determining the appropriate sentence rests elsewhere, was denied (3/503).

### **Suppression Motions & Hearings**

Although the State asked Judge Fuente to adopt the rulings made before the first trial on Pasha's motions to suppress, Judge Fuente elected to conduct de novo hearings. (3/463-65,469-83,566) The suppression hearings occurred in 2011 and 2012. Testimony was taken on March 3, May 6, June 10, 2011, for Pasha's motions to suppress a 911 recording and to suppress evidence flowing from the stop of his vehicle (S80/724,805). The parties submitted written arguments (5/878-894,902-918,931-980), and Judge Fuente issued an order denying Pasha's motions on December 16, 2011, with a corrected order entered on January 3, 2012 (6/1017-1022,1030-1035). More testimony was taken on April 20, June 1 and 7, 2012, relating to a Miranda issue.

Prior to the March 3, 2011 hearing, the prosecutor said he intended to address at the same time both the motion to suppress physical evidence seized from the van and the motion to suppress the 911 call (18/105). Pasha explained that he was moving to suppress all evidence flowing from the stop of his van under the Fourth Amendment (18/116-117). He was alleging fabrications and manipulations of the 911 call records.

At the March 3, 2011 hearing, the judge allowed the State to admit the 911 recording as a business record, overruling Pasha's objection based on his allegation of tampering.

(S80/730) The judge told Pasha that he could still challenge the recording's reliability or authenticity. (S80/731) "So the tape will come into evidence and defendant can do what he wants to show that it's been tampered with. That's his burden."

(S80/732)

Over the course of the several hearings, the State presented the testimony of Gisela ("Gigi") Sanchez, the 911 caller who worked for a cleaning company at the Woodland Corporate Center on August 23, 2002; her husband, Jose Sanchez, who also worked for the cleaning company; and Deputies Kevin Mason and James Stahlschmidt, the two officers who stopped Pasha's van (S80/735,831;S23). Pasha presented Heidi Schrock, the 911 records custodian at the Sheriff's Office; Sgt. John King, whose name is listed on the 911 transcript; Deputy Rembert, who provided back-up and asked Pasha for his ID at the scene of the traffic stop (S25/430-31); Deputy Rojak, who handcuffed Pasha "for his own safety" (S25/433); Deputy Chancey of the crime scene unit (S25/439); and Barry Malone, a security guard who spoke to the Sanchezes before the 911 call was placed. (By agreement, Malone's deposition was moved into evidence as

Defense Exhibit 5 to avoid having to call him at the hearing (S25/451-52)).

Hillsborough County Sheriff Deputies Kevin Mason and James Stahlschmidt were assigned to the Selective Enforcement Squad in a zone that encompassed the Woodland Corporate Center.

(S23/229-230,265) At around 11:21 p.m., on August 23, 2002, they received radio and digital communication from a dispatcher regarding a suspicious person. (S23/230-32,266-68). The transmission from the dispatcher was made via a digital transmission (known as a DXT) and radio communication.

(S23/231-32,266) The system used then was no longer in use at the time of the hearing in 2011 (S23/266). The transmission did not state that a crime had occurred (S23/284). It was not dispatched as a criminal code; it was dispatched as a suspicious person, known as a Signal 13. (S23/284,294-96).

The dispatcher "is not a law enforcement officer or trained professional." (S23/295).<sup>4</sup> Stahlschmidt testified, "Our dispatcher is not qualified to determine whether a crime is committed." (S23/294) If a crime is alleged, the dispatcher

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<sup>4</sup> Heidi Schrock was a communications dispatcher in 2002, although not the one that answered the call in this case. (S25/377,381). She said that ten years ago, when she was a dispatcher, you did not have to be certified to be an operator, but they are in the process of changing that now. (S25/402).

would try to put that in a certain criminal code for the dispatch. (S23/295).

Deputies Mason and Stahlschmidt were within a mile of the entrance to the business park and arrived there quickly, in a minute or two (S23/230-32,268-69). The information they had received, as annotated by Stahlschmidt in his report, "was suspicious person in a vehicle. The subject that emerged from the woodline had gone through the park and appeared to be covered in blood and holding an unknown object, possibly a knife, and entering a van at a different location." They were given the tag number of the van. (S23/269-70, see also 233). Stahlschmidt testified, "At that point I didn't know of a crime that was committed." (S23/284) Stahlschmidt repeatedly stated at the suppression hearing that he did not know of any specific crime being committed when he made his investigative stop of the van. (S23/299-300) "I didn't have reasonable suspicion to know in fact a crime had been committed." (S23/287) "At that point I did not know what was committed." (S23/300). Stahlschmidt also did not have any knowledge of whether any business was opened or closed at that time. (S23/285)

Upon approaching the entrance to the Woodland Corporate Center, the deputies saw a white van, which looked like a work van, followed by a red pickup truck with two occupants.

(S23/233,271,285) The van was heading northbound approaching an intersection where the traffic light was red; the van came to a stop. (S23/234,271-72) People in the truck were flashing the lights and pointing to the van. (S23/234,271) The deputies performed a U-turn to pull behind the van, activated red and blue lights on top of their vehicle, and approached the van on foot. (S23/235-36,273)

Deputy Stahlschmidt approached the driver's side and Mason approached the rear. (S23/236,272) Stahlschmidt could see nothing through his side. (S23/273). Mason used a flashlight to illuminate the inside of the van, looking through the rear window, the side cargo window, and the passenger side front door. He saw articles of clothing, boots and miscellaneous tools. "[Y]ou could tell it was a work-style vehicle." (S23/237,240). The white articles of clothing and boots in the back of the van appeared to have red material smeared on them, consistent with the report of blood. (S23/246-47) Stahlschmidt was talking to Pasha, who was looking straight ahead. (S23/248,273) Pasha's hands were on the steering wheel, gripping tight, and he was sweating profusely. (S23/248-49,273) Mason signaled to Stahlschmidt to use caution. (S23/248,276).

Stahlschmidt suspected that Pasha might flee, so he stepped back and unstrapped and unholstered his weapon and let Pasha see

that he did it (S23/276-77,308-311). He then directed Pasha to put the van in park and step out of the vehicle. (S23/250,276) Mason came around the front of the vehicle and started to talk with Pasha. (S23/250).

Pasha was wearing dress slacks, dress-style socks, and a t-shirt, with small red dots splattered on the left side. (S23/275). Mason said, the "talking point we started to dwell on was he had blood on his shirt that I pointed out to him." (S23/251). Mason first asked Pasha if he was injured. He was concerned to see if he needed medical attention, and he was trying to get an explanation for the blood. (S23/252). The conversation went back and forth with Pasha saying he was not injured and with Mason questioning him about whose blood it was. Pasha told Mason that "he had been running through the woods, found a rabbit and killed a rabbit and it was indeed rabbit's blood." (S23/252) At that point, Mason immediately advised Pasha of his Miranda rights. (S23/253). "At that point based on everything that we had the totality of the circumstances leading up to the traffic stop and now his admission that it was indeed blood of some sort, he wasn't injured, I figured that the blood had to come from somewhere, I immediately retrieved a Miranda warning card from my pocket, advised him of his Miranda warnings." (S23/253).

While Mason was talking to Pasha, Deputy Stahlschmidt went to the pickup truck to speak with the occupants. (There was a time later when Mason and other deputies at the scene gathered the names and personal information of the Sanchezes (S23/255)). Deputies Rojack and Rembert arrived on the scene. Mason and Stahlschmidt left with the Sanchezes to have them point out where they saw Pasha in the corporate park. (S23/256). Pasha was left standing there, accompanied by at least two other deputies. (S23/259).

On an embankment, Mason found folded U.S. currency (could not recall the denomination), a piece of paper, and a knit-style black cap. (S23/257-58). Stahlschmidt said he had "become aware" of a \$10 bill that appeared to be splattered with blood laying next to a knit black cap.<sup>5</sup> (S23/280). Mason said, "At that point in time I think it's fair to say I thought my investigation was going towards crimes against a person of some sort." (S23/259) Stahlschmidt said that he suspected "armed robbery, some type of assault." (S23/281). Mason called back to the deputies holding Pasha and gave the directive to put him in

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<sup>5</sup> No testimony was adduced about these items at trial. (S67/1000-01;S73/1849). Prior to the first trial, the prosecutor characterized the items as a receipt from Save-A-Lot with a bill of "\$5 or something" wrapped in the receipt, near a ski cap (SC08/28/397-98). Judge Fuente had granted a motion in limine to exclude them because the State did not establish a nexus with the charges. (SC08/28/397-99).

handcuffs (S23/260). "That would be basically at that point not knowing what we were dealing with was just from a standpoint of officer safety." Stahlschmidt continued with the Sanchezes into the business complex (S23/160,163,260). Behind the maintenance building, in the cul-de-sac area, near the AT&T building, they found a car crashed into a wall and the bodies of the two women (S23/162,261,281).

Judge Fuente issued his ruling denying the motions to suppress at a hearing on December 16, 2011 (20/281-82). A six-page corrected written order was entered on January 3, 2012 (6/1030). Pasha asked if he could file a motion for reconsideration, and the judge responded that he could certainly do that at any time (20/297). On January 13 2012, Pasha filed a Verified Petition For Reconsideration of Denial of Motion to Suppress. (See S30/566; 23/376).

On April 20, 2012, the trial court proceeded on the State's motion for rehearing on the suppression issue that had been resolved against the State before the first trial.<sup>6</sup> The State

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<sup>6</sup> The trial court had granted Pasha's 2007 motion to suppress statements finding a Miranda violation. (See SC08/29 (hrq of 10/22/07; 6/1035 n.1). After the 2010 remand, the State moved for reconsideration, and the court agreed to rehear the motion in its entirety (S30/557-562). Ultimately, the court reversed the prior order and denied the suppression. (7/1282-1284).

presented the testimony of the two deputies who read Pasha Miranda warnings at the scene of the traffic stop, Kevin Mason and Michael Cabrera (23/376-381,389,412). Mason testified that he used a standard HCSO Miranda warning card to inform Pasha of his rights. (23/389). Pasha agreed to talk, and he was coherent and sober. The deputy did not suspect that he was under the influence of anything (23/391). The deputy asked questions about the blood and when Pasha showed that he was not injured, the deputy advised him of the Miranda warnings (23/402-03). According to Mason, Pasha was "in custody at that time." (23/403). Mason was asked about whether he saw anything suspicious before he stopped the van.

Q. You say you was trying to find out what was going on. What you -- going on regarding what?

A. The situation that we had at hand. At that point in time we were there on a suspicious person. Obviously the information that we were given was matching what we were seeing. At that point in time though we didn't have the full scope of the actual investigation.

Q. Did you see anything suspicious about the person in the van before you stopped it?

A. It would be impossible for me to see something suspicious before I saw it.

(23/404).

### **Disqualification of Judge Fuente**

In April 2012, Pasha filed a verified motion for disqualification of the trial judge, which Judge Fuente granted in May 2012 (6/1170-75,1179). Pasha's January 2012 motion for reconsideration of the motion to suppress was then pending. On May 18, 2012, Pasha filed a motion requesting the newly-assigned judge to reconsider, vacate or amend Judge Fuente's orders on Pasha's motions, including Fuente's orders denying his motion to terminate standby counsel (filed October 2011) and motion to suppress evidence (filed January 2011) (6/1180-84). Judge Fernandez denied Pasha's January and May 2012 motions for reconsideration (6/1037-45,1180-1184;26/455-463;7/1267-69).

#### **Demand for Speedy Trial**

On June 1, 2012, Pasha asked Judge Fernandez to set a tentative trial date. He told the judge that he was not demanding speedy trial, but he had been working on the case for ten years, and he thought they were getting to the end of the motions. (26/483-485). Judge Fernandez declined to set a trial date at that time (26/485). However, later that year, Judge Fernandez expressed her desire to set the case for trial:

THE COURT: I would really like to set this case for trial because we keep coming back and this is the end of his request, so I'm hoping we can come back in 30 days.

[PROSECUTOR]: That's fine, Your Honor.

(S35/601-02). Shortly thereafter, on October 24, 2012, Pasha filed a demand for speedy trial pursuant to Florida Rule of Criminal Procedure 3.191(b). The motion is dated October 22, 2012, but date stamped by the clerk on October 24. (7/1355-1358).

On October 30, 2012, the judge noted that Pasha filed, among other things, his Demand for Speedy Trial and a Motion to Terminate Standby Counsel. (29/583,7/1370-1376) The judge said the demand was filed on October 22, 2012, and said she would honor the demand: "So we have 45 days from today's date. And, Mr. Gale, you need to get your case together." Prosecutor Gale responded, "Yes, that's fine." (29/608)

Regarding Pasha's motion to terminate his standby counsel, the judge said she had not witnessed Pasha and Hernandez having any substantive conversations while she had been presiding over the case, and said, "So I'm not really understanding as to why you want to terminate him as standby counsel because he really hasn't done anything." (29/611) Pasha disputed the judge's assessment and then Attorney Hernandez disputed Pasha's allegations.

[MR. PASHA]: You don't—you don't know what he has done, Your Honor. He's an organ of the State. Everything I explained to him, he's another assistant--he's another Assistant State Attorney. He work[s] as if he is a State Attorney.

\* \* \* \*

THE COURT: Mr. Hernandez, am I correct in that you really haven't had any substantive conversations with Mr. Pasha about his case other than I've seen you --

MR. HERNANDEZ: ... Not in a while, Your Honor. I think initially when I was appointed as standby counsel, he was asking me questions and asking me to do things such as expedite the issuance of subpoenas and motions and things of that nature.

Since, probably the last two or three months when he addressed this matter before you, he basically has not wanted to discuss his case with me, but we have had no bad words towards each other, and I can certainly assure the Court that I'm not in any way trying to undermine his case. The most contact that I have had with him in the last month was Mr. Gale [the prosecutor] called me and asked me to see, to pinpoint what witnesses he wanted--this is before the last status--to pinpoint what witnesses and photographs he wanted and what witnesses he wanted to depose.

And I went to see him at the jail as basically trying to expedite the matter, and he indicated to me that he did not want to share that information with me, so...

THE COURT: So I'm going to deny your motion to terminate standby counsel.

(29/611-13).

On November 7, 2012, Judge Fernandez urged Pasha to accept the appointment of an attorney, but he refused.

THE COURT: Mr. Pasha, I would have to advise you, in my opinion, you would be far better to be represented by a trained lawyer than you can be by yourself in representing yourself. Although I think that you have some understanding of the law, I don't think that you have an understanding of the law that is equivalent to a seasoned trial attorney that's been practicing for 10 years or more or 15 years or more, although I think that you do have--you filed motions. You do have an understanding of motion practice and that

you're familiar with some of the rules of procedure. I would still strongly urge you not to represent yourself because once again, I don't think that you are as qualified as a seasoned attorney that's been practicing law for 10 or 15 years.

THE DEFENDANT: I agree with that.

THE COURT: So would you like me to appoint an attorney to represent you?

THE DEFENDANT: No, ma'am.

(30/633). The judge made a finding "once again, that the defendant is steadfast in representing himself." (30/634). The judge then denied, among other things, Pasha's new Motion to Terminate Standby Counsel. Pasha protested the summary denial.

THE COURT: . . . Next motion that you filed is . . . a Motion to Terminate Standby Counsel. After having considered that motion, I'm denying that motion as well, considering the seriousness and the severity of this case.

THE DEFENDANT: You had a hearing on that motion?

THE COURT: I don't need a hearing on that motion. I am not allowing you -- you've made this motion before. It's a repetitive motion, Mr. Pasha. It's not the first time that you've asked me to terminate standby counsel.

THE DEFENDANT: That's the tenth motion I've made.

THE COURT: It may be the tenth motion, and I'm still holding steadfast to my ruling that I'm denying your motion to terminate standby counsel.

THE DEFENDANT: I fear--I fear--I fear--I fear for my safety. I fear it's an injustice to have him as a standby counsel. I emphatically--I emphatically fear that having Mr. Hernandez, I will never get justice in no court.

There is no way and with the fear I have coming to court, a fear with Mr. Hernandez here arguing with the State, there is no way in this 13th Judicial Circuit, I can get any justice with him.

THE COURT: Okay. And for the record, I have had hearings on your case probably from July of this summer until now, which we're in November, and I cannot recollect one time that Mr. Hernandez has spoken on the record. Now, all he's done is stand next to you. So I'm going to deny your motion for standby counsel.

He's never uttered a word in any of your hearings. He has just stood next to you or sat next to you.

THE DEFENDANT: . . . [W]hat he's done in open court is not the issue I raised. I have never mentioned anything that he's done in open court in my motion. What he's done hasn't occurred in open court. So to base your decision on what he's done in open court is not the issue at all because I've never raised that issue.

(30/635-37). After denying the motion, the judge told Pasha that his trial is set for November 26. Pasha said, "I'll be ready to go on November 26<sup>th</sup>." And he said, "We won't ask for no continuance." (30/644).

The November 19, 2012<sup>7</sup> hearing was noticed for the State's Motion for Return of Property.<sup>8</sup> Before addressing the motion, Judge Fernandez asked if Pasha wanted her to appoint counsel. Pasha replied, "No, ma'am." (31/653) The judge then offered an

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<sup>7</sup> The transcript of this remarkable hearing is required reading for a full understanding of Issue I.

<sup>8</sup> The motion was filed to obtain release of evidence entered during the first trial, for the State's use at the second trial. Pasha had no objection to the motion. (31/677)

inducement, saying that if Pasha would agree to the appointment of an attorney, she will actually allow the attorney to re-litigate any of the motions that Pasha filed and she ruled on. (31/653). She repeats this offer several times during the hearing.

THE COURT: Any other hearings that we've had in the past, do you want me to appoint an attorney to represent you, and I'll actually allow your attorney to re-litigate any of the motions that you filed and that I ruled on?

THE DEFENDANT: That's --

THE COURT: Do you want me to appoint an attorney to represent you so that you can re-litigate any motions that you filed?

(31/653-54). The judge says she wants Pasha to "rethink" his position about representing himself. She is making the offer because this is the last time she will see him before the trial starts on November 26. When Pasha inquires about the attorney she intends to appoint, the judge says that she intends to appoint Attorney Hernandez and that the trial will have to be postponed. (31/654-55).

I will allow Mr. Hernandez to refile and re-litigate any of the motions that you filed in the past that I've already ruled on because he's more experienced in my opinion. He's a more experienced attorney than you are because you haven't been to law school yet, and you don't have a law degree. So I will offer that to you.

I mean, obviously, we can't have a trial on Monday if Mr. Hernandez is going to re-litigate all of these motions

because I know that he's going -- he's going to want some time to review the motions.

I'm doing this, Mr. Pasha, because honestly, this is the last time I'm going to see you. . . . Once Monday morning comes around, we're picking a jury.

THE DEFENDANT: I think he has -- I am, Your Honor. I appreciate your --

THE COURT: Are you sure?

(31/654-55). Pasha asserts that he has a pending Bar complaint against Hernandez and asserts that "[t]here should be a conflict of interest in him assisting me, anyway, at this point."

(31/656). The judge disputes that the record discloses a conflict and presses Pasha to state the grounds. Pasha tells the judge that he is not prepared for that issue, but that the grounds had been asserted in his prior motions to terminate Hernandez as standby counsel. An extended debate ensues, with the judge saying that she does not understand how Pasha can have any sort of conflict with Hernandez, and with Pasha saying that he has filed about ten motions that speak to that issue. The judge insists that he restate his grounds for wanting to terminate Hernandez. Although Pasha objects to being put on the spot to argue his prior motions, he tries to comply and explain why he and Hernandez "will probably never talk again."<sup>9</sup> (31/668)

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<sup>9</sup> Pasha recounts allegations including that Hernandez never gave him the records sent to him from his appellate attorney, as he

The judge debates the sufficiency of Pasha's allegations, and Pasha explains that this issue did not start in front of Judge Fernandez. (31/671).

Judge Fernandez then questions Attorney Hernandez, who says that he has tried to accommodate Pasha and says he has done "absolutely nothing" to undermine Pasha's case. Hernandez says he has been standby counsel for a couple of years, and says, "I don't know what happened that he now thinks I'm an organ of the State." He last attempted to see Pasha a couple of months ago at the behest of the State Attorney, but Pasha did not want to answer his questions. (31/671-74). Upon being questioned by the judge, Pasha reaffirmed that he wanted to represent himself and did not want Hernandez to act as his attorney:

THE COURT: All right. And, Mr. Pasha, I'm assuming by the conversation that we just had before we proceed on the substance of this motion and I make a ruling on the motion that you do not want me to -- you do not want Mr. Hernandez to act as counsel for you, correct?

THE DEFENDANT: No, ma'am.

THE COURT: And you still desire to proceed pro se?

THE DEFENDANT: Yes, ma'am.

(..continued)

had promised to do; Hernandez made Pasha look silly by telling people that Pasha said the State "was trying to poison him," when Pasha had complained about being given another inmate's medication at the jail; and, Hernandez had acted on behalf of the State Attorney and interfered with Pasha's cross-examination of a witness during a hearing.

THE COURT: Because, you know, he is very familiar with your case. He has been, you know, tracking your case for a couple of years now and he's very competent to represent you.

\* \* \* \*

Again, you don't want me to appoint Mr. Hernandez to represent you; is that correct?

THE DEFENDANT: No, ma'am.

THE COURT: And you still desire to proceed pro se?

THE DEFENDANT: Yes, ma'am.

(31/675-676). The discussion then turned to the pending motions.

THE COURT: . . . And again before we go through these motions, you do not want me to appoint Mr. Hernandez to represent you on these, either; is that correct?

THE DEFENDANT: No.

THE COURT: Again, any of the motions that you previously filed, I'm willing to allow Mr. Hernandez, if you want him to represent you, I would allow him to re-litigate them, which means I would allow him to refile and reargue any of the motions that you previously filed in front of me.

Do you want Mr. Hernandez to represent you? I'm asking you for a third time because I'm getting ready to rule.

(31/677-78). Pasha asks for a second to think. The judge ordered a recess: "Just for five minutes so he can think about my offer again." (31/678). When the court reconvened, Pasha relented and agreed to the appointment of Hernandez as his attorney:

THE COURT: All right, we're back on the record in State of Florida versus Mr. Khalid Pasha, Case Number 02-13478. I took a little over a five-minute break. Mr. Pasha requested time to think about whether or not he wanted me to appoint Mr. Hernandez to represent him, who is now as standby counsel.

And so, Mr. Pasha, have you been able to rethink?

THE DEFENDANT: One more second. (Conferring with Mr. Hernandez as standby counsel.)

Excuse me. That was nothing. With the name of God, most gracious and most merciful, I'm going to accept that, Your Honor.

THE COURT: Okay. You want me to go ahead and appoint Mr. Hernandez to represent you?

THE DEFENDANT: Yes, ma'am.

THE COURT: Okay.

(31/679).

With Pasha ostensibly agreeing to the judge's terms, the discussion turned to the demand for speedy trial. (31/682-683). Hernandez said he was "nowhere near ready to try the case," and said that "realistically I would be looking at some time in late summer, early fall." (31/683). The judge told Pasha that accepting the appointment of counsel "comes with a concession" that he is not going to be ready for trial until late next summer. Pasha said he understood, and the Judge told him: "So yes, your demand for speedy trial, it gets stricken." The State Attorney interjected that the demand had to be withdrawn. The

judge replied, "Let me rephrase that. It doesn't -- it will be withdrawn by Mr. Hernandez." (31/686).

The prosecutor expressed concern to the judge that "we can lose this whole case" if "one of us messes up this part of the deal."

[PROSECUTOR]: If there is a motion, I mean, because this is--obviously, if we, one of us messes up this part of the deal, then we can lose this whole case. This has to be very, very clear what we're doing.

THE COURT: I understand. He's accepting--you're accepting Mr. Hernandez as counsel, correct, Mr. Pasha?

THE DEFENDANT: Yes, ma'am.

THE COURT: He's now formally accepted Mr. Hernandez as his attorney.

MR. GALE: But that does not negate all the motions that have previously been filed when Mr. Pasha was pro se. Those are still effective.

THE COURT: I'm going to allow Mr. Hernandez to re-litigate like the motion to suppress if he wants to where Mr. Pasha was representing himself if Mr. Hernandez wants to refile it. It doesn't negate any of my previous rulings.

MR. GALE: My concern is with the demand for speedy trial, that's not simply negated simply because we've appointed new counsel.

THE COURT: Mr. Hernandez as his attorney, he would withdraw it, he would ask to withdraw it.

(31/686-87). The prosecutor explained to the judge that while he would rather deal with an attorney than a pro se defendant, given the history of the case, "the State is not going to be

surprised that several months down the road Mr. Pasha wants to discharge Mr. Hernandez and represent himself." (31/693).

Before adjourning, the judge set the next hearing for December 7, 2012. (31/695).

On November 30, 2012, Pasha filed two motions. He filed a "Motion to Proceed Pro Se," in which he recounts the recent events and contends that was "hoodwinked" by the judge's offer to reconsider all previously denied motions. The offer forced him to make a choice between two co-equal rights, to be heard or to continue pro se, and the offer was made to circumvent his trial date of November 26, 2012. (8/1406-08). He stated that he unequivocally wanted to represent himself without counsel or standby counsel. (8/1408).

Pasha also filed a "Motion to be Heard" in which he states: "As a matter of law, because of the extraordinary circumstance that exist, a trial should be scheduled and began before the expiration date of the recapture period of the Demand for Speedy Trial Petitioner filed on October 24, 2012." (8/1411) He again recounts the recent events and asserts that Judge Fernandez's offer forced him to make a choice between co-equal rights, the right to be heard or the right to continue pro se.

5. Petitioner was hoodwinked by that offer being convinced by Judge Fernandez that justice would prevail. Later realizing that the sole purpose that it was made was

to circumvent Petitioner "Demand for Speedy Trial," that was scheduled to start on November 26, 2012.

6. If there is validity in those plea[d]ings and Petitioner believe there is, a just and impartial Judge would have issued an order Granting them or at least reconsider them, and not base Justice on who filed them.

\* \* \* \*

These extraordinary circumstance[s have been] brought on by Judge Fernandez being partial to, and running interference for Mr. Hernandez who is an organ of the State, regardless of his actions.

\* \* \* \*

As a matter of law and correctness, and because of these extraordinary circumstance, and so that Petitioner won't be irreparably prejudiced, this matter should be returned to Fla. R. Crim. P. 3.191(p) (3) and trial scheduled to start before the expiration of the recapture period.

Wherefore, Petitioner believe that to return to Fla. R. Crim. P 3.191(p) (3), is the only correct solution to this matter short of discharge and pray that this Court will issue an order granting all just and proper remedies in this matter.

(8/1413-15).

On December 7, 2012, the judge addressed Pasha's two motions, in which he was asking to proceed pro se again and asking for a continuation of his speedy trial demand. The judge refused to recognize the continuation of Pasha's speedy trial demand, but she regarded the "Motion to Be Heard" as an entirely new demand for speedy trial.

THE COURT: . . . you filed two motions, additional motions after the last time that we were here.

THE DEFENDANT: Yes, ma'am.

THE COURT: And one of them is a Motion to Proceed Pro Se and the other one is a Motion To Be Heard, and in the body of that Motion To Be Heard, it says that you are demanding speedy trial again.

THE DEFENDANT: It's a continuation of the initial speedy trial.

THE COURT: You already--there is no continuation of the initial speedy trial because you withdrew that motion the last time that we were here. So before we get--before we get into that issue and I allow you to be heard on that issue, the first motion that I am going to take up is your Motion to Proceed Pro Se. And the last time that you were here, which I think is the 19th, I want to say November 19th --

THE DEFENDANT: Yes, ma'am.

THE COURT: -- I had given you a continuance of your trial because you asked for an attorney to assist you. You asked for Mr. Hernandez to assist you. You wanted him to assist you during the course of your trial. . . .

\* \* \* \*

THE COURT: So you've changed your mind again since November 19th, is what's happened.

THE DEFENDANT: Well, really, I didn't ask for him, Ms. Fernandez. You pushed him off on me.

THE COURT: That may be your perception as to what happened, but the record will speak for itself as to what actually occurred on November 19th. We don't have to debate that issue. So the only thing that I need to know right now is right now, you're now telling me you wish to discharge him as your attorney; is that correct?

THE DEFENDANT: Yes.

(32/700-702). Although he wanted to discharge Hernandez, Pasha wanted to keep the newly appointed second-phase attorney (at that time, Mr. Brunvand) (32/717). The judge initially said Pasha would have to withdraw his demand for speedy trial if he wanted to keep the second-phase counsel, and because Pasha had not yet spoken with Mr. Brunvand, the judge indicated that she intended to strike the demand for speedy trial, but Pasha objected, saying: "Oh, Your Honor, it's still in effect, the speedy trial." (32/719). The prosecutor suggested that "if he's not going to withdraw that demand for speedy trial, we go to penalty phase with whatever state of readiness that attorney that he wants can be in in the time allowed." Pasha agreed with this suggestion. (32/721). The discussion turned to scheduling.

MR. GALE: I think in all fairness to the State, I'm going to ask for the latest possible date to commence this trial.

THE COURT: That would be the 22nd.

MR. GALE: Which I believe would be January 22nd.

Ultimately the judge opted to schedule the jury selection for January 14, 2013. The prosecutor responded, "That's fine, Your Honor." (32/724-726).

On December 17, 2012, Pasha filed a "Notice of Expiration of Speedy Trial Time" and a "Verified Motion for Disqualification," seeking the disqualification of Judge

Fernandez. (8/1434-38; 8/1441-54). On December 21, 2012, Judge Fernandez entered a five-page order denying the motion for her disqualification. (8/1455-59).

On January 2, 2013, Pasha filed a motion for discharge for lack of speedy trial (8/1549-51). On January 3, 2013, Judge Fernandez entered an "Order Striking Defendant's Notice of Expiration of Speedy Trial Time and Order Denying Defendant's Motion for Discharge for Lack of Speedy Trial." (8/1552-1569). Pasha filed a motion for reconsideration of motion for discharge for lack of speedy trial on January 14, 2013. (8/1585-89). Judge Fernandez denied it orally on the record (S61/38). That same day, the prospective jurors were sworn (S61/41-43).

### **The Trial**

From the opening statements it was clear that the central issue was the identity of the perpetrator. (See e.g., S67/955, where Pasha says, "I can admit to the fact that all, basically, what the State said is correct except the fact that Mr. Pasha didn't commit these crimes.") Throughout the trial, Pasha challenged the accuracy and thoroughness of the police investigation, as he said he would do in his opening:

But rather than the police doing the full investigation in the case, they started putting pieces together and making things happen. . . . I will prove to you that this case is made up half truths and lies, and Mr. Pasha is not guilty of

this crime because of the lack of the investigation in this crime, because of the half -- the halfway job that they did on this case searching for the real killer of this job, real killer or killers of this job in this case.

(S67/956-57).

Initially, the judge read the jury a stipulation: the parties stipulated that Robin Canady and Reneesha Singleton were killed on August 23, 2002, in the Woodland Corporate Center in Tampa (S69/1165-66; see also S76/2292). There was no eyewitness to the killing. And the prosecutor acknowledged in his closing argument that the State could not show any motive for the crimes. "You haven't heard any evidence what the motive was." (76/2312-13).

The State relied on circumstantial evidence to prove the identity element. Pasha was walking near the crime scene with blood on him after the women were killed. (S67/948). Pasha's van was stopped by police as he was driving out of the corporate park. (S67/949; S76/2292). The women's blood was on Pasha's clothing and other items seized from his van, including a white tyvek suit and a pair of rubber boots, a broken tire thumper, and a knife. (S67/951-953;S76/2292-93).

Pasha and Robin Canady met in 2001 and married in July 2002 (S71/1591;S73/1745). Pasha worked as a technician for an environmental engineering firm, HAS Engineers and Scientists,

which involved conducting field sampling, predominantly ground water and soil sampling. (S71/1572-74). Tyvek suits, boots and gloves were typically worn by technicians. (S71/1574-76,1579). Pasha drove a company van that was exclusively for his use. (S71/1576-77). Canady worked for Gentiva Care Centers, in the Woodland Corporate Center (S73/1743). Pasha and Canady frequently visited each other at their work places. (S71/1591;S73/1758).

On Friday, August 23, 2002, Pasha spent the day working in Tarpon Springs with a co-worker. (S71/1577-78). That evening, he attended an Islamic study session (S70/1313-14). Afterward, he was at home with Canady, who had returned from grocery shopping (S73/1749;1756). Felecia Solomon, Canady's daughter who was at home with them, was not aware of any animosity between Pasha and Canady that night (S73/1758). Pasha went out again to deliver his alimony payment to his ex-wife, Donna Murray. (S73/1764,1768).

Canady left in her Buick to meet her daughter, Reneesha Singleton, at the Nokia Building in the Woodland Corporate Center, where Singleton was attending a training session. (S73/1743). Before Singleton came out of the training session, a witness, Roland Ware, saw a man walking in a white outfit near the Nokia Building and approaching Canady's car. (S72/1617-18).

A student, Kenia Perez-Melendez, left the building with Singleton and saw her walking toward the Buick, where a woman was in the driver's seat and a male was sitting in the back seat. (S72/1651-52).

Jose Sanchez was sitting at a picnic table near the maintenance building when he saw Pasha walking past in a white outfit that appeared to be soiled with blood. (S70/1415-16). Jose did not know Pasha and did not know what he was doing. Pasha was not running. He looked disoriented and frightened. (S70/1442;S71/1522-23). Jose did not know if Pasha had committed any type of crime (S71/1523). Jose called his wife, Gigi, who was driving around in a golf cart, and told her about the man he had seen. (S68/1040-41;S70/1415-16). He then drove his pick-up truck to Gigi's location. (S70/1416-17). Based on what Jose had seen and described to her, Gigi called 911 and reported that she had seen a man in a white suit that appeared to be covered with blood walking in the Woodland Corporate Park. (S68/1040-43,1045;S70/1419;S71/1527-1529). At the time that the call was made, Gigi had not seen the man herself. (S71/1527-1529). During the call, Jose is heard speaking in Spanish in the background while Gigi is speaking to the operator, and at times, speaking to Jose in Spanish. (S68/1045-53;S70/1421-22).

Over a hearsay objection, a recording of the 911 call was played for the jury (S68/1039-45). Although the recording was admitted by the trial judge as an excited utterance, when Gigi was asked the predicate question of whether she was excited when she made the call, she answered, "no." (S68/1043). She repeated on cross-examination that she was not excited. (S68/1092).

The trial judge permitted the prosecutor to distribute a purported transcript of the call to the jurors for them to read along while they listened to the recording. The jurors were not given any instruction by the judge that would limit their consideration and use of the transcript. The copies were collected from the jurors by the bailiff after the tape was played and the State Attorney retained the transcript copies in his files.<sup>10</sup>

The seven-page transcript indicates in all capital letters on every page: "SHERIFF'S OFFICE HILLSBOROUGH COUNTY, FLORIDA."

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<sup>10</sup> No copy of this transcript was put in evidence or even in the court file. During the pendency of this appeal, this Court relinquished jurisdiction to the trial court to reconstruct the record. Assistant State Attorney Gale produced a copy of a transcript, and the trial judge accepted it into evidence and specifically recalled reading it while the recording was played during trial. (S78/694-701;S79/705-714). The judge certified that the document was the same one that the jurors had been given. (S79/714). After the hearing, the prosecutor located in his files the actual copies that were provided to the jury during the trial. (S82).

The heading on the first page, says: "9-1-1 call," a case number, and the designation: "Homicide." Although the recording contains voices that are speaking Spanish, the transcript reflects that English is being spoken throughout. On the last page, the last line reads: "wg/Cpl. J. King, Pid #0586, 25 August 2006."<sup>11</sup>

The recording, as transcribed by the court reporter (also reflected on the distributed transcript), begins with an introduction by an unidentified person):

The following is a recording of a call received at Hillsborough County Sheriff's Office on 8/23/2002, on or about 2321 hours reference Hillsborough County Case No. 02-081848. Event number is 3585. Original signal code 050. Call location from 4502 Seedling Circle.

(S68/1045). Gigi Sanchez is heard telling the operator, "I just saw a guy drop -- walking, dressed in white, but he's full of blood. He's soaked in blood, at the Woodland Center on Dale Mabry and Waters." A man can be heard speaking in Spanish, throughout, which the official court reporter indicates as: "MALE: (Speaking in Spanish.)" (S68/1045). During the call, Gigi reports that she now can see the man. She asks a question, "is

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<sup>11</sup> Wanda Garriga, a transcriptionist for the Hillsborough County Sheriff's Office, typed the transcript of the 911 call from a CD given to her by a detective in 2006 (S75/2132-35). She had no familiarity with the 911 system. The title, "Homicide," on the transcript was the title she was given (S75/2136-37).

he white or black?" (S78/695). Gigi says that the man is "dangerous." (S68/1047). (Pasha unsuccessfully objected to this at trial). Gigi says that the man is running, is hiding, has changed his clothes, is entering a white van, and is driving away. She gives the tag number of the van. It is clear from the context when Gigi sees the man for the first time:

MALE: Hey, look at him running.

FEMALE: Oh, I see him. He's running. He's running right now. I see him. Okay. He's going into Nokia building. He's in the Nokia building parking lot.

MALE: (Speaking in Spanish.)

\* \* \* \*

FEMALE: He's a black male, and he's dressed in white.

OPERATOR: In the Nokia building?

FEMALE: He's going to the Nokia building in the parking lot. He's walking. He's on foot. He's running.

MALE: (Speaking in Spanish.)

FEMALE: He's got something on his hands. I don't know if it's a knife or whatever it is.

MALE: (Speaking in Spanish.)

OPERATOR: Okay, ma'am. Where is he at now? Is he on Dale Mabry or on Waters?

FEMALE: No, he's in the parking lot on the Woodland Center in the Nokia building.

OPERATOR: Okay.

FEMALE: He's walking. He's black, and he's dressed in white. Now he's going toward -- he just left the parking lot. He's going to the building next to Nokia. He's going to -- what's the name of the building?

MALE: (Speaking in Spanish.)

FEMALE: The State Farm. He's in the State Farm Building parking lot right now.

MALE: (Speaking in Spanish.)

OPERATOR: He's in the State Farm Building?

FEMALE: He is in the parking lot. The security -- the security is here from the property now.

OPERATOR: The security is there?

FEMALE: Yeah. Tell them he's full of blood. There's a white male -- there is a black male. Okay. He's dressed in white. He's full of blood, and he's got something in his hands. He was running. He was on the Nokia parking lot. He just went through, I think it was the State Farm Building right there.

MALE: (Speaking in Spanish.)

FEMALE: So be careful because he got something on his hands. I just called the cops. I'm on the phone with the cops. Okay? So you be careful. He's dangerous.

(S68/1045-47). At this point, Pasha objects, and the audio is paused.

THE DEFENDANT: I object. I have an objection.

THE COURT: And the basis of your legal objection?

THE DEFENDANT: My legal objection is Florida Statute 604. She's made the statement he's dangerous, be careful, he's dangerous. She has no personal knowledge. She don't know who the person was. She don't know his character. That's a person she has no knowledge of.

THE COURT: Okay. I'll overrule that objection.

(The audio resumed.)

FEMALE: I see him. I see him. Hey. Hey. Hey.

\* \* \* \*

The security guard is with me. He went back there. He's hiding back there by that tree in the back.

OPERATOR: He's in the back, hiding behind a tree by the State Farm Building?

FEMALE: Yeah. Uh-huh. Yeah. Watch. He got something. He sees me. If he walks over here, we have nothing.

OPERATOR: Hang on, ma'am.

FEMALE: You see him? Yeah. Be careful.

\* \* \* \*

OPERATOR: Is he bleed -- is -- is the blood because he's bleeding or is it --

FEMALE: I don't know if he is bleeding or got into a fight with somebody, but he's up to something. He's up to no good because he's running. He's hiding. Now he's hiding. I don't see him now, so I don't know where he went.

MALE: I don't see him now. He's out there somewhere.

\* \* \* \*

FEMALE: There he is. There he is. I see him. I see him. I see him. I see him. Here he is. Here he is. He just changed clothes. Now he's wearing a T-shirt.

\* \* \* \*

FEMALE: He's getting into a van.

\* \* \* \*

He just opened it and went in it. He got in the van. He took off the white clothes, and now he's wearing a white T -- a white T-shirt. He closed the van. He's out. He's out of the van.

MALE: Is the police coming?

FEMALE: How much longer before the cops get here?

OPERATOR: I don't know, ma'am.

MALE: Oh, Jesus Christ.

FEMALE: We need the tag on the van. Look, he's leaving. We need the tag -- the tag (unintelligible).

\* \* \* \*

FEMALE: The sheriff is right behind him.

OPERATOR: The sheriff's behind him?

FEMALE: Yeah, but hopefully he'll get him.

OPERATOR: Are they pulling him over?

\* \* \* \*

FEMALE: Yeah. They just pulled him over.

OPERATOR: Okay, ma'am. Good. I'm glad.

FEMALE: They got him.

\* \* \* \*

(The audio recording ended.)

MR. HARB: For the record, Your Honor, the bailiff collected all 16 copies from the jury.

THE COURT: Okay.

(S68/1047-52). In the transcript given to the jury, the Spanish speaking male says in English that the guy was walking dressed in white (S78/695-701). In response to Gigi's question if the guy is white or black, the male says, "he's black," and says to tell them "to hurry up." And he says, "He has something in his hands," and, "He's got blood on his clothes." When Pasha is getting in to his van, the male says, "He's opening the door," then says, "He's stealing, he wants to steal." He asks, "Is the police coming?" (S78/699).

The police, responding to the 911 call, stopped the white van that Pasha was driving (S72/1655-1661). Officer Stahlschmidt did not have any knowledge that Pasha committed a crime at that time. (S72/1681). Stahlschmidt drove through the corporate park with the Sanchezes (S72/1663). On a cul-de-sac, Seedling Circle, he found a crashed car, blood stains on the road, and the bodies of Canady and Singleton lying in a grassy area (S72/1666-69). Both had a severed carotid artery, multiple stab wounds, and signs of blunt force trauma (S74/1983,1989-2000). The women had been dragged into the grassy area (S74/1987).

Pasha's van was impounded and inventoried. The police took photographs of everything in the van, and although an officer testified that a knife was found in a rubber boot inside the van, there was no photo depicting the knife in the boot.

(S68/1026; S73/1827-28,1841-42,1862-63; S75/2063-69,2074-75). A crime scene technician had photographed and inventoried a serrated knife that was found on the ground at the crime scene, but that knife was later identified as one that a deputy had brought to the scene and dropped on the ground. (S68/1120-28;S69/1229,1263-66,1281,1291,1299-1302;S73/1854-1857).

In his defense, Pasha testified that on August 23, 2002, he drove Reneesha to school in the morning and then proceeded to Tarpon Springs where he and his co-worker, Bill Hutchinson, collected water samples. (S76/2228). He went home at 5:30 or 6, showered, and went to Islamic services until 9 or 9:30. He then went to see his ex-wife to deliver his alimony payment. (Id.) He was tired and had a bad headache, and she gave him some Advil or Tylenol. (S76/2229). He then proceeded back home to eat dinner and prepare for bed. (Id.)

However, before he got home, he received a call on his cell phone from Robin. She asked him to come out to the Woodland Corporate Center to help her find her ring. (Id.) Pasha was reluctant to go, but Robin was insistent.

I told her it's nighttime; we can wait until tomorrow because this is Friday, and Saturday, nobody's going to be there so we could find it then. She said, "Ah, come on." She persisted that I come out there. So I went out there.

(Id.) He met her in the State Farm parking lot, where they would sometimes eat lunch together (S76/2229-30). When he got there, Robin admitted that she had not lost her ring, but said she had some things that she wanted to take care of, and she asked Pasha to just "keep an eye on things" for her.

She told me, she say, you know, I don't have no rings missing. She said, I got some things I want to take care of out here. I explained to her, discussed it. Without going into detail, we discussed it, and she said, all I want you to do is just keep an eye on things for me, and I'll handle everything.

(S76/2230). Pasha explained that when he and Robin first met, she was in a bad situation financially. "[S]o she didn't have enough money to make it. So this was one of the things she was doing at night." (S76/2231).

Because Pasha was wearing expensive shoes and pants, Robin told him to put on something else to avoid getting dirty, so he changed into his tyvek suit.

I put that on to keep from getting dirty. That's the natural thing I do. I wear Tyveks because I have four or five of them in the van.

(S76/2231-32). She left him in the State Farm lot and went to the Nokia lot to pick up her daughter while Pasha put on the tyvek suit he had in his van. He then walked over to meet Canady in the Nokia lot and got into the back of the car.

Reneesha would ride in the front seat while they drove him back to his van. (S76/2268-2272).

Canady then asked him to wait for her at the west end of Seedling Circle.

She said, Stay here. Give me about 10 or 15 minutes. She said, If you see me blink my light or blow my horn and stuff, she said, you come down here, just come down here. Other than that, just stay there; I'll be back to get you in just a second. So I said, okay. I just stood there and stood there and waited and waited.

(S76/2232). When she did not return, he went looking for her.

When he came upon the bodies and realized they were dead, he was hysterical.

When I came close and close to the cul-de-sac, I walked up and saw my wife, Robin, laying on the ground, and I ran to her. When I ran to her, I kind of grabbed the body and intended to hold it, but before I did, I heard something, voom, like kind of a noise like that. I looked at Raneesha laying on the other side of her. I went to Raneesha, and I picked her up, and I put my head on her chest to kind of see if she had a heartbeat. I fe[lt] her neck. When I attempted to feel her neck, there was a hole there, but the hole that was in her neck, I didn't know if she was shot or cut. You couldn't tell because it was like a hole that somebody had got stabbed or shot in the neck.

Where she was cut, I put my hand back down there, and there was no pulse. There was nothing of a heartbeat. That meant she was dead.

I go back over to Robin and check her out, and they're both dead. So when I see this, I run down towards -- I think that's Manhattan. I run down towards Manhattan to see if I could see anybody. I didn't. I ran back south to the little pond. I didn't see anybody. I looked out in the cul-de-sac. I didn't see anybody. I mean, I was messed up. I was hysterical.

(S76/2233-2234). Pasha picked up a broken bat that was lying on the ground and started walking back to his van.

As I started walking around looking at the scene, I saw this broken baseball bat, what they call a tire thumper; I saw that. I saw some other material laying around and stuff. So I picked the bat up, and I started walking back towards my van.

Now, if you asked me now why I did that, perhaps I won't have no excuse or reason and under those affluent [sic] circumstances, definitely I didn't have no reason. You're not thinking normal, so you don't make a normal decision.

(S76/2234-35). As he walked back to his van, he saw people sitting at some tables in front of a building. He kept walking and a truck came up behind him, but then it drove ahead of him. When he got back to his van, he removed the tyvek suit and started to drive away. (S76/2235-36).

I cut between the buildings, the maintenance building and the First Florida building. I went up the street into the AT&T building -- not AT&T, the State Farm building. And I took off -- I took off this Tyvek, and I wrapped this bat that I had, I wrapped it in the Tyvek suit and I stuck it inside one of the boots, and I laid it down in the well between the sliding doors, the same sliding doors of the cargo area. I laid it down in that little gap there.

And I'm still not quite -- I'm still not quite normal at this point. I just see myself walking around for a second, walking around for a few seconds. And then I got into the van. I didn't put my other shoes on right away. My shirt, I didn't put it on right away, and started out.

(S76/2235-36). He denied that the knife was ever in his van. He recognized the knife introduced by the State as one that had

been in Canady's car; it was previously in their flower bed and had crud on it, but it had been shined up. (S76/2282-85).

After his arrest, Pasha was taken to a small room at the police station, where he was photographed by a deputy early in the morning. He had no obvious injuries or blood on him. (S75/2159,2162).

### Sentencing

During the penalty phase, Judge Fernandez overruled the defense objection to the sufficiency of the evidence for CCP, and thereafter instructed the jury on CCP as an aggravating factor. (51/3303-04;52/3369-70). For each count, eleven jurors voted to recommend death and one juror voted to recommend life in prison. (52/3384). Judge Fernandez found that the State had proved four aggravating circumstances; she gave great weight to one and significant weight to three: (1) previously convicted of a felony involving the use or threat of violence to the person (significant); (2) CCP (significant); (3) heinous, atrocious, or cruel (great); and (4) committed after the Defendant had committed a felony and was on parole (significant) (11/2005-10).

The judge found one statutory mitigating circumstance, the capital felony was committed while the Defendant was under the influence of extreme mental or emotional disturbance (moderate weight), and found eleven nonstatutory mitigating circumstances:

(1) Pasha was 58 years old at the time of the crime (slight weight); (2) he is currently 69 years old (slight); (3) he suffered from prostate cancer and wears a colostomy bag (slight); (4) he never knew his father (moderate); (5) he lost his biological mother and then his aunt, whom he considered his mother, at a very young age and was passed off to be raised by an absent uncle and extended family members (moderate); (6) he was raised in an era in which segregation existed and racism was prominent, and he was the victim of harsh racism and racial prejudice as a child (moderate); (7) he was subjected to corporal punishment during his childhood, left home at age 16 to work at General Motors, was never known to be violent, and was active in church as a child (moderate); (8) he was and is devoted to the Islamic religion (slight); (9) he never abused alcohol or drugs (slight); (10) he provided for his family (slight); (11) he was a good employee and hard worker (slight) (11/2010-13).

#### **SUMMARY OF THE ARGUMENT**

The first three issues concern **pretrial rulings**. **First**, Judge Fernandez coerced Pasha to (1) relinquish his right to self-representation, (2) accept Hernandez as his attorney, and (3) withdraw his demand for speedy trial. Soon after the November 19,

2012 hearing, Pasha rescinded his assent to the deal, but Judge Fernandez continued to hold Pasha to the coerced withdrawal of the demand for speedy trial. Because the judge's coercion rendered the agreement void and Pasha rescinded his acceptance of the deal, the judge erred by refusing to effectuate the October demand for speedy trial. The judge subsequently erred by striking the notice of expiration of speedy trial time and denying motions for discharge. This Court must remedy **the speedy trial violation** by ordering discharge. Absent that remedy, this court should grant new trial before a different judge because Judge Fernandez erred in refusing to grant the meritorious motion for disqualification that was based on the record events.

The **second** issue involves denial of the **motion to suppress** evidence seized pursuant to the illegal traffic stop. The officers who stopped Pasha's vehicle lacked a reasonable suspicion that he had committed a crime. Subsequent to the stop and seizure, the police lacked probable cause to detain him while they searched for some indication that a crime had been committed.

The **third** issue concerns the reappointment of **Attorney Daniel Hernandez** after he had been removed for cause in 2006. The trial court erred by reappointing him to the case in 2010, denying Pasha's motions to dismiss him, and then elevating his status above that of mere standby counsel.

The next five issues concern **errors made by Judge Fernandez at trial**. The **fourth** issue concerns errors involving admission of the recording and transcript of a **911 call**. The trial court erred in denying Pasha's motion to exclude the recording and the transcript because the exhibits include an introduction that was made by someone in law enforcement; it was obviously not simply the original 911 call. The trial court also erred in overruling Pasha's hearsay objection to the recording. Further, the recording was partly in Spanish and no official interpretation was provided. And the transcript distributed to the jury was a document created by the Hillsborough County Sheriff's Office, containing an unofficial Spanish translation. No instruction was given to inform the jury that the transcript was not in evidence. The transcript could not have been authenticated for use as "a demonstrative aid" because it was not an accurate reflection of the 911 recording. The **fifth** issue involves the denial of Pasha's request for **an alibi instruction**. The judge committed reversible error when she denied the timely request for the standard instruction on the law pertaining to the defense. The **sixth** issue involves the **judge addressing the jurors** with regard to scheduling the sentencing proceedings. The judge's remarks, made during the defense's presentation of its case, left the jurors with the impression that the **judge expected a guilty verdict** to be

forthcoming. The **seventh** issue involves admission of **gruesome morgue photographs** that were not probative of any contested issue at trial. The **eighth** issue involves **a variety of erroneous evidentiary rulings** by Judge Fernandez that individually and cumulatively served to deny Pasha a fair trial.

The **ninth** issue involves a variety of improper **remarks and argument by the prosecutor** that served to deny Pasha a fair trial.

The last four issues involve **the penalty proceedings**. The **tenth** issue involves the judge instructing the jury on **CCP** and subsequently relying on that aggravator. The **eleventh** issue concerns **jury instructions**, where the jury was **instructed that elements of two aggravators existed as a matter of law**, thus depriving Pasha of jury findings on the two aggravators. The **twelfth** issue involves the judge **misusing the Tedder standard** and misconstruing the legal requirement that she give "great weight" to the jury recommendation. The **thirteenth** issue challenges the constitutionality of Florida's death penalty statute in light of **Ring v. Arizona**.

#### **ARGUMENT**

**ISSUE I: THE DEAL OFFERED BY JUDGE FERNANDEZ AT THE NOVEMBER 19, 2012 HEARING WAS VOID AS AGAINST PUBLIC POLICY AND PASHA'S PURPORTED ACCEPTANCE WAS COERCED; AFTER PASHA REPUDIATED THE DEAL, THE JUDGE ERRED BY STRIKING THE NOTICE OF EXPIRATION OF SPEEDY TRIAL TIME, DENYING THE MOTION FOR DISCHARGE, AND DENYING THE MOTION FOR DISQUALIFICATION.**

When Judge Fernandez took over the case as the successor to Judge Fuente, Pasha moved for reconsideration of certain orders of Judge Fuente, including the order denying the suppression motions. See Fla. R. Jud. Admin. 2.330(h) (renumbered from 2.160(h) (authorizing successor judge to reconsider rulings of recused judge). (6/1180,7/1267). In her order of June 2012, denying Pasha's motion for reconsideration, Fernandez wrote that Judge Fuente had "adequately addressed the issues raised" in Pasha's suppression motions (7/1269).

But at the pretrial hearing of November 19, 2012, Judge Fernandez offered to rehear and reconsider all of her prior rulings, and it was understood and specifically stated that she would rehear the suppression motions, if Pasha would agree to waive his right to self-representation and accept Hernandez as his attorney and withdraw his demand for speedy trial. Judge Fernandez violated due process when she made this offer because it chilled Pasha's exercise of his right to self-representation and denied him his asserted right to speedy trial. Amends. 6, 14, U.S. Const.; Art. 1, § 16, Fla. Const.; § 918.015, Fla. Stat.; Fla. R. Crim. P. 3.191.

An inducement offered by a trial court to a defendant, to persuade him to waive a fundamental right violates the defendant's

right to due process of law. See People v. Collins, 27 P.3d 726, 734 (Cal. 2001) (“In effect, the trial court offered to reward defendant for refraining from the exercise of a constitutional right.”); see also United States v. Jackson, 390 U.S. 570, 582 (1968) (“Whatever might be said of Congress' objectives, they cannot be pursued by means that needlessly chill the exercise of basic constitutional rights.”).

Judge Fernandez's offer to rehear all of Pasha's motions if he accepted an attorney chilled his exercise of self-representation under the Sixth Amendment. See Faretta v. California, 422 U.S. 806, 834 (1975) (“To force a lawyer on a defendant can only lead him to believe that the law contrives against him.”). Judge Fernandez's offer is a particularly blatant Faretta violation because after the remand by this Court in 2010, throughout years of litigation, Pasha never wavered from his insistence on representing himself. And Pasha made a clear record of his conflict with Attorney Hernandez, who had actually been removed as standby counsel in 2005 based on Pasha's unrefuted allegation of disloyal conduct by Hernandez.

Judge Fernandez characterized her motive for making the offer as concern for Pasha's best interest because he had not gone to law school. The judge's motive is immaterial here, but it should be noted that the expressed motivation does not justify the offer

she made because Faretta does not permit inquiry into the quality of a defense, so Pasha's lack of formal legal education was not a legitimate reason to justify coercing him to accept an attorney. See, e.g., Muehleman v. State, 3 So. 3d 1149, 1160 (Fla. 2009) (noting that once a court determines that a competent defendant waives the right to counsel, the court may not inquire further into whether the defendant could provide himself with a substantively qualitative defense).

Faretta explains that "[t]he language and spirit of the Sixth Amendment contemplate that counsel, like the other defense tools guaranteed by the Amendment, shall be an aid to a willing defendant—not an organ of the State interposed between an unwilling defendant and his right to defend himself personally." 422 U.S. at 820. Deprivation of his Sixth Amendment right of self-representation was complete when Pasha acceded to the coercion of the trial judge to thrust counsel upon him and then agreed to withdraw his demand for speedy trial in exchange for the promised procedural benefit. A Faretta violation is a structural error, for which prejudice to the defense is presumed. "Obtaining reversal for violation of [the Sixth Amendment right to represent oneself] does not require a showing of prejudice to the defense, since the right reflects constitutional protection of the defendant's free choice independent of concern for the objective

fairness of the proceeding.” Flanagan v. United States, 465 U.S. 259, 268 (1984) (citing McKaskle v. Wiggins, 104 S.Ct. 944, 951 n. 8 (1984)); see also United States v. Gonzalez-Lopez, 548 U.S. 140, 148-49 (2006).

Inherent in the judge’s offer to Pasha was the implication that the outcome of Pasha’s pretrial motions would likely be more favorable to him if he agreed to the judge’s terms. Conversely, the judge’s offer implied that her prior rulings had been negatively influenced by Pasha’s pro se status. A trial court should not imply to a defendant that rulings on the merits of motions or issues hinge on his procedural choices, but that is exactly what occurred here. Cf., State v. Warner, 762 So. 2d 507, 514 (Fla. 2000) (“To avoid the potential for coercion, a judge must neither state nor imply alternative sentencing possibilities which hinge upon future procedural choices, such as the exercise of a defendant's right to trial.”); see also People v. A. C., 27 N.Y.2d 79, 86, 261 N.E.2d 620, 625 (1970) (“[A] procedure which offers an individual a reward for waiving a fundamental constitutional right, or imposes a harsher penalty for asserting it, may not be sustained.”).

The legal error that arose from the judge making the offer to Pasha can be analogized to judicial involvement in plea negotiations, which “must be limited ‘to minimize the potential

coercive effect on the defendant, to retain the function of the judge as a neutral arbiter, and to preserve the public perception of the judge as an impartial dispenser of justice.'" Warner, 762 So. 2d at 513 (quoting People v. Cobbs, 505 N.W. 2d 208 (Mich. 1993)). The concerns that led this Court in Warner to hold that a judge must not initiate a plea dialogue are equally applicable here.

The unequal positions of the judge and the defendant raise a question of fundamental fairness. The judicially initiated negotiation here, offering to rehear Pasha's suppression motions if he complied with procedural choices dictated by the court, was fundamentally unfair. Because Pasha repudiated his acceptance of the deal shortly after the hearing, the risk was high that the judge lost her ability to be objective in her dealings with him.

Given that the pretrial motion hearings had occurred over many months, and in the case of the suppression motions, had involved the time-consuming testimony of a number of witnesses, Judge Fernandez's offer to rehear and reconsider the motions was an enormous carrot to dangle before Pasha. If he had been given time to think about it, Pasha would have then realized that because the judge would only rehear the motions if Attorney Hernandez chose to refile and relitigate them, and because Pasha could not control whether Hernandez would choose to do that, the

incentive offered him was an illusory promise. See Pan-Am Tobacco Corp. v. Dep't of Corr., 471 So. 2d 4, 5 (Fla. 1984) ("It is basic hornbook law that a contract which is not mutually enforceable is an illusory contract."). But Pasha was not given any time to think through the realities of the offer because the judge was pressuring him to make an immediate decision. The jury trial was to start in seven days and acceptance of the offer meant that the trial would be postponed for at least six months to a year.

The due process violation renders involuntary Pasha's purported acceptance of the judge's terms. Pasha's acceptance of appointed counsel was not a free and deliberate choice; he acquiesced to pressure and coercion by the judge, agreeing to be represented by the attorney that he had been complaining about for years. The pressure and coercion used by the judge renders the acceptance of the offer and the withdrawal of the demand for speedy trial an involuntary act. See Johnson v. Zerbst, 304 U.S. 458, 464 (1938) (courts indulge every reasonable presumption against waiver of fundamental rights); People v. Collins, 26 Cal. 4th 297, 312, 27 P.3d 726, 736 (Cal. 2001) ("The manner in which the trial court induced defendant to waive his right to jury trial rendered that waiver involuntary.").

No legitimate deal could be reached based on the terms offered by the judge because the terms were contrary to public

policy. E.g., T.C.B. v. Fla. Dep't of Children & Families, 816 So. 2d 194, 195-96 (Fla. 1<sup>st</sup> DCA 2002) (holding settlement contract void as against public policy). In analogous contract terms, the deal that Judge Fernandez struck with Pasha at the November 19<sup>th</sup> hearing was void ab initio as against public policy. "A contract which violates a provision of the constitution or a statute is void and illegal, and, will not be enforced in our courts." Harris v. Gonzalez, 789 So. 2d 405, 409 (Fla. 4<sup>th</sup> DCA 2001); see also TTSI Irrevocable Trust v. ReliaStar Life Ins. Co., 60 So. 3d 1148, 1150 (Fla. 5<sup>th</sup> DCA 2011) (insurance policy is void ab initio where owner of policy lacks an insurable interest in the life of the insured).

Alternatively, Pasha exercised his right to rescind the transaction based on fraud in the inducement, so the judge and the State had the obligation to undo the original transaction and restore him to his former status. See, e.g., TTSI Irrevocable Trust, 60 So. 3d at 1150. Pasha had the right to be restored to his original position when he rescinded his acceptance of the offer in his motions filed on November 30, 2012, wherein he stated that: "As a matter of law, because of the extraordinary circumstance[s] that exist, a trial should be scheduled and began before the expiration date of the recapture period of the Demand for Speedy Trial Petitioner filed on October 24, 2012." (8/1411).

Pasha's motions of November 30, 2012, put the State on notice that the deal crafted by the judge on November 19, 2012, was void and he intended to enforce his right to speedy trial by demand. Judge Fernandez elected to treat Pasha's Motion to be Heard as a new demand for speedy trial, and she continued that erroneous assumption throughout the trial, remarking, "[w]e are proceeding with his trial, and it is within speedy trial," and, "[y]ou demanded speedy trial, so we're having your trial."

(S67/1001,1003).

The only demand filed was Pasha's October 24, 2012 demand, and the 50-day speedy trial period triggered by that demand ended on December 13, 2012. Since Pasha was not brought to trial within 50 days, pursuant to rule 3.191(b)(4), he had the right to a remedy under the recapture provision in subdivision (p):

(3) No later than 5 days from the date of the filing of a notice of expiration of speedy trial time, the court shall hold a hearing on the notice and, unless the court finds that one of the reasons set forth in subdivision (j) exists, shall order that the defendant be brought to trial within 10 days. A defendant not brought to trial within the 10-day period through no fault of the defendant, on motion of the defendant or the court, shall be forever discharged from the crime.

Pasha's notice of expiration of speedy trial time, filed on December 17, 2012 (8/1434-38) triggered the State's obligation to set a hearing within five days and schedule the trial within the ten-day recapture period after the day of the hearing. It was the

State's burden to schedule a hearing within the five-day period, as the window of recapture operates to the State's benefit. Baxter v. Downey, 581 So. 2d 596, 598 (Fla. 2d DCA 1991). The time to schedule a hearing and start the trial expired with no hearing being set. No hearings occurred between December 7, 2012, and the start of trial on January 14, 2013. Pasha filed a Motion for Discharge for Lack of Speedy Trial on January 2, 2013. (8/1549).

On January 3, 2013, Judge Fernandez entered an order striking Pasha's notice of expiration of speedy trial and denying his motion for discharge (8/1552-69). Afterward, on January 14, 2013, Pasha filed a Motion for Reconsideration on Motion for Discharge for Lack of Speedy Trial (8/1585). The judge denied this motion too. (S61/38). Pasha filed a Second Amended Motion for Arrest of Judgment on July 30, 2013, that set forth the facts in detail resulting in the violation of the speedy trial rule (10/1958-64; order denying at 11/2057).

Judge Fernandez erred when she struck the notice of expiration and denied the motions for discharge. This court must enforce the speedy trial rule and direct that Pasha be discharged pursuant to his October 24, 2012 demand because the State failed to bring him to trial within the recapture period. See Landry v. State, 666 So. 2d 121, 126 (Fla. 1995) ("Because the June 25 order

denying Landry's demand for speedy trial was a nullity, the trial court further erred by not setting the case for trial in accordance with subdivision (b)(2).”).

Given the bad faith of the trial judge and prosecutor on display here, the Sixth Amendment right to speedy trial was violated and requires relief as well. See Doggett v. United States, 505 U.S. 647, 657 (1992) (recognizing that official bad faith in causing delay will “make relief virtually automatic”).

Although Pasha is entitled to speedy trial discharge under both the state and federal constitutional guarantees, if this Court denies him that remedy, then he should be given a new trial before a different judge. Pasha filed a Verified Motion for Disqualification on December 17, 2012, seeking Judge Fernandez’s disqualification. The motion was, for the most part, based on her actions at the November 19<sup>th</sup> hearing, which she refused to acknowledge and remedy by enforcing the speedy trial demand when given the opportunity on December 7, 2012 (8/1441-1454). Judge Fernandez denied the motion for disqualification on December 21, 2012, by attempting to refute the facts that Pasha alleged in his motion. However, because the facts underlying the motion are in the record, this court should review this order de novo, see § 38.02, Fla. Stat., and reverse it.

Judge Fernandez denied the motion for disqualification on

alternative grounds, the first being that "many of the allegations are untimely." The grounds for the motion are based on a continuing set of circumstances that included the judge's actions on December 7, 2012 (8/1443,1449,1451,1453), which she specifically addresses in her order (8/1457), so the December 17<sup>th</sup> motion was timely filed. Next, the judge "denies that she has tricked the Defendant into accepting counsel." (8/1456). The record, however, corroborates Pasha's allegations. The judge's offer to Pasha on November 19, 2012, and the subsequent events demonstrate that Judge Fernandez abrogated her role as a neutral arbitrator and coerced Pasha to accede to the appointment of counsel and the withdrawal of his demand for speedy trial.

In addition, Pasha also raised in the motion for disqualification the issue of the judge holding a hearing without his presence, which the judge denied (8/1456). However, the record reflects that on September 21, 2012, Judge Fernandez discussed the case with the assistant state attorney and Hernandez while Pasha was absent from the courtroom, waiting in the holding cell for his case to be called. Pasha was only brought out at the end of the discussion to be told when the next court date would be. (S33/577-582). So the record substantiates this allegation.

This Court should order a discharge on the basis of the speedy trial violation. If that remedy is denied, at the very

least, this Court should remedy the error caused by the judge's denial of the disqualification motion and remand for a new trial before a different judge. See Tumey v. Ohio, 273 U.S. 510, 534 (1927) ("No matter what the evidence was against him, he had the right to have an impartial judge.").

**ISSUE II: THE TRIAL COURT ERRED BY DENYING THE MOTION TO SUPPRESS ALL EVIDENCE FLOWING FROM THE ILLEGAL STOP AND DETENTION.**

The State did not meet its burden of proving that the deputies who stopped Pasha, directed him out of his van, and detained him had the reasonable suspicion necessary to justify the initial stop and the probable cause necessary for the ensuing detention. There are several components to this argument. First, the information given by Gigi Sanchez to the 911 operator cannot be imputed to the knowledge of the officers who made the stop because the dispatcher was a civilian employee, not a law enforcement officer. Because the officers did not know the source of the dispatch and whether it was reliable at the time they stopped the van, the tip must be considered to have originated from an anonymous source, meaning that it falls at the low end of the reliability scale. Based on what the officers knew from the dispatch they received, which was a noncriminal Signal 13 "suspicious person" dispatch code, they lacked a founded suspicion that a specific crime had been

committed or was being committed. There was only a vague hunch that an undetermined crime may have been committed.

And even if all the information conveyed by Gigi Sanchez in the 911 call is imputed to the knowledge of the officers who conducted the stop, which would elevate Gigi's status to that of a citizen informant and increase the degree of reliability of the information, the officers still lacked a founded suspicion to justify the stop because no specific crime was known or reported in the 911 call. Gigi did not provide the 911 operator with an objectively reasonable basis for a stop of Pasha's vehicle because she did not know what he was doing. She only had a hunch that he was "up to no good," as she told the operator.

And even if Gigi Sanchez is considered a citizen informant because the information she gave to the civilian employee at the Sheriff's Department can be imputed to the officers and then that information is considered to be an adequate allegation of a specific crime, suppression is still required because after stopping, detaining, and questioning Pasha about the blood, the officers lacked the probable cause required to extend the scope of the detention. The officers lacked a sufficient basis for the continuing detention that ensued when they detained Pasha while the deputies who conducted the stop (Stahlschmidt and Mason)

drove around the corporate park to look for an indication that a crime had occurred.

The U.S. and Florida Constitutions both guarantee the right to be free from unreasonable searches and seizures. Baptiste v. State, 995 So. 2d 285, 290 (Fla. 2008); Amends. 4, 14, U.S. Const.; Art. 1, §12, Fla. Const. “The Fourth Amendment permits brief investigative stops—such as the traffic stop in this case—when a law enforcement officer has ‘a particularized and objective basis for suspecting the particular person stopped of criminal activity.’” Navarette v. California, 134 S. Ct. 1683, 1687 (2014) (quoting United States v. Cortez, 449 U.S. 411, 417–418 (1981)); see also Terry v. Ohio, 392 U.S. 1, 21–22 (1968); Alabama v. White, 496 U.S. 325, 330 (1990). Before stopping a person for the purpose of investigating possible criminal behavior, the officer must have “reasonable suspicion that the person is engaged in criminal activity.” J.L. v. State, 727 So. 2d 204, 206 (Fla. 1998), aff'd, 529 U.S. 266 (2000); see also State v. Teamer, 39 Fla. L. Weekly S478 (Fla. July 3, 2014) (“To warrant an investigatory stop, the law requires not just a mere suspicion of criminal activity, but a reasonable, well-founded one.”). “Reasonable suspicion, like probable cause, is dependent upon both the content of information possessed by police and its degree of reliability. Both factors—quantity and quality—are

considered in the 'totality of the circumstances—the whole picture' . . . that must be taken into account when evaluating whether there is reasonable suspicion." White, 496 U.S. 325.

The officers stopped Pasha based on transmissions they received from a civilian dispatcher who was not a law enforcement officer and who lacked the training necessary to make a determination of reasonable suspicion. In this instance, the State is not entitled to rely on the fellow-officer rule to justify the stop because the testimony is clear that the dispatcher was not a fellow law enforcement officer. See United States v. Colon, 250 F.3d 130 (2d Cir. 2001) (holding that civilian 911 operator's knowledge could not be imputed to an officer because the operator lacked training to assess information in terms of reasonable suspicion). In State v. Maynard, 783 So. 2d 226 (Fla. 2001), this Court relied on the analysis of State v. Evans, 692 So. 2d 216 (Fla. 4<sup>th</sup> DCA 1997), which applied the fellow-officer rule to conclude that information in the hands of a dispatcher regarding a caller's identity could be imputed to the officer. But Maynard and Evans cannot govern the analysis in this case because here the State provided undisputed testimony from Deputy Stahlschmidt that, at the time of this event, the 911 dispatcher who sent out the

Signal 13 code was "not a law enforcement officer or trained professional." (S23/295).

The caller, Gigi Sanchez, was an anonymous tipster for the purpose of the analysis because the officers who stopped Pasha based on the dispatch received had no independent knowledge of the caller's identity. See Colon. When asked at the hearing if the Sanchezes could have been a couple of pranksters calling 911, the deputy responded, "That could have been possible." (S23/307). "Anonymous tips are at the low-end of the reliability scale," Maynard, 783 So. 2d at 229, and thus require independent corroboration. See Berry v. State, 86 So. 3d 595 (Fla 1<sup>st</sup> DCA 2012); Tobin v. State, 146 So. 3d 159, 162 (Fla. 1<sup>st</sup> DCA 2014). In Navarette, 134 S.Ct. at 1689, the anonymous tip from person who claimed eyewitness knowledge of crime bore adequate indicia of reliability for the officer to credit the account, which the Supreme Court contrasted with cases like Florida v. J.L., 529 U.S. 266 (2000), in which the anonymous tip came from an informant who did not claim to have personally observed an illegal act. This case falls into the latter category, so the analysis must be governed by J.L. because Gigi Sanchez did not observe Pasha committing any crime before she called 911, and she did not allege that she had knowledge of any

specific crime, in contrast with the tipster in Navarette who claimed to have personal knowledge of reckless driving.

Here, the officers made no corroborative observations suggesting that Pasha had engaged in actual or potential criminal activity before they stopped his vehicle and inspected the interior with a flashlight. See Tobin, 146 So. 3d at 162 (anonymous report of a disturbance where someone was overheard yelling 'Shoot me now,' did not provide reasonable suspicion for the stop of vehicle leaving the property); J.H. v. State, 106 So. 3d 1001, 1003 (Fla. 3d DCA 2013) (no reasonable suspicion for stop where officer responded to scene of fight reported by anonymous caller and observed no fight, but stopped a youth matching description who was sweating, out of breath, and nervous); Feathers v. Aey, 319 F.3d 843, 850 (6th Cir. 2003) ("An anonymous tip that an individual pointed something at a tipster does not support a finding of reasonable suspicion even when police find the described individual in the relevant area.").

When the officers stopped Pasha's van and ordered him out of the vehicle, the officers lacked information as to the Sanchezes' basis for initiating the suspicious person report. Officer Stahlschmidt did not speak to the Sanchezes or even discuss the situation with Officer Mason before he unsnapped his

gun holster and made sure that Pasha saw him do it and ordered Pasha out of the vehicle.

Even if this court imputes all the information possessed by the dispatcher to the officers, thereby giving the tipster the reliability of a citizen informant, the stop and subsequent detention are still illegal. The dispatcher classified the call as a Signal 13, which was not a criminal code. This fact, by itself, should have alerted the officers that the dispatcher did not possess a basis for a vehicle stop. There were not enough facts in the possession of the officers for a Terry stop because no allegation was made in the 911 call that a crime had been committed or was being committed. See Tobin, 146 So. 3d at 162 (“[E]ven if, as the State argues, we could characterize the callers as citizen informants, there still was insufficient information given to support a reasonable, articulable suspicion that a crime had been, or was being, committed.”); United States v. Johnson, 620 F.3d 685, 693-94 (6<sup>th</sup> Cir. 2010) (“To the extent that the caller suggested a limited, unspecified possibility of criminal activity, her tip could not be considered reliable unless the officers' own observations raised the prospect of criminal activity.”).

Gigi Sanchez did not provide the dispatcher sufficient information to support a reasonable suspicion for the stop

because she did not know or allege that a crime had occurred. In fact, the security guard who spoke to Gigi Sanchez, Barry Malone, had declined to make the 911 call because he did not think there was reason to do so. (5/804;S76/2225-26). The issue here is whether the officers had reasonable suspicion, not whether Gigi had it. Nevertheless, she conceded on the 911 call that she did not know what the man was doing. On the call, when the operator asked Gigi if the man was bleeding, Gigi said: "I don't know if he's bleeding or that come from somebody but he's up to something. He's up to no good." (S80/750). (The transcript entered shows Gigi saying "I don't know if he's bleeding or he got into a fight with somebody . . ." (S78/698).

Reasonable suspicion requires that the tip be reliable in its assertion of illegality, not just in its tendency to identify a determinate person. See J.L., 529 U.S. 266, 272. A reviewing court must "look at the 'totality of the circumstances' of each case to see whether the detaining officer has a 'particularized and objective basis' for suspecting legal wrongdoing." United States v. Arvizu, 534 U.S. 266, 273 (2002) (quoting Cortez, 449 U.S. at 417-418)). "Even a reliable tip will justify an investigative stop only if it creates reasonable suspicion that 'criminal activity may be afoot.'" Navarette, 134 S. Ct. at 1690 (quoting Terry, 392 U.S. at 30); see also Cortez,

449 U.S. at 417 (“An investigatory stop must be justified by some objective manifestation that the person stopped is, or is about to be, engaged in criminal activity.”); Brown v. Texas, 443 U.S. 47, 52 (1979) (“In the absence of any basis for suspecting appellant of misconduct, the balance between the public interest and appellant's right to personal security and privacy tilts in favor of freedom from police interference.”).

“[A] mere ‘hunch’ does not create reasonable suspicion.” Navarette, 134 S. Ct. 1683, 1687 (quoting Terry, 392 U.S. at 27); see also Thomasset v. State, 761 So. 2d 383, 385 (Fla. 2d DCA 2000) (“[A] well-founded, articulable suspicion of criminal activity is required before an officer may conduct an investigatory stop or detain an individual. Mere suspicion of criminal activity does not suffice.”). “The officer's suspicion must relate to a particular crime rather than a generalized suspicion that the person detained is ‘up to no good.’” State v. Z.U.E., 315 P.3d 1158, 1163-64 (Wash. App. 2014) (quoting State v. Bliss, 222 P.3d 107 (Wash. App. 2009)). “The Fourth Amendment simply does not allow a detention based on an officer's ‘gut feeling’ that a suspect is up to no good.” United States v. Urrieta, 520 F.3d 569, 578 (6th Cir. 2008).

The totality of the circumstances did not provide the officers with the required founded suspicion for the

investigative stop. The officers conceded as much at the suppression hearing when they repeatedly said that they did not know what crime may have been committed when they made the vehicle stop. When a dispatcher issues a bulletin in the absence of reasonable suspicion, then a stop in the objective reliance upon it violates the Fourth Amendment. United States v. Hensley, 469 U.S. 221, 232 (1985). “[I]f the dispatcher lacked sufficient information to satisfy the reasonable suspicion requirement, and the officers' subsequent observations did not produce reasonable suspicion, then the stop violated [the Defendant's] Fourth Amendment rights.” Feathers v. Aey, 319 F.3d 843, 849 (6th Cir. 2003) (discussing Hensley).

Furthermore, the stop cannot be justified as a Terry stop for the offense of loitering and prowling (as suggested by the officers (S23/299,347-49)). Because there is no evidence that Pasha had done anything to objectively raise a reasonable sense of alarm in the officers when they first observed him stopped at the red light, the officers could not justify the stop on the basis of investigating a loitering and prowling violation. McClamma v. State, 138 So. 3d 578, 588 (Fla. 2d DCA 2014) (“The officer did not make this stop to develop the final evidence needed to establish that all elements of this misdemeanor had occurred in the officer's presence.”). “[L]aw enforcement

officers invariably create problems when they try to justify a stop based on loitering or prowling because they are a little short of the reasonable suspicion needed for a Terry stop for some other offense." Id. at 585. Loitering and prowling is a crime that must occur in the presence of the officer who orders the arrest. Id. at 587.

"[A]n investigative detention must be temporary and last no longer than is necessary to effectuate the purpose of the stop." Florida v. Royer, 460 U.S. 491, 500 (1983). Pasha was read his Miranda rights after he was asked to provide an explanation for the blood, and he told the officers that he had encountered a dead rabbit in the woods. Deputies Mason and Stahlschmidt then left Pasha at the intersection with other officers while they went to look for evidence of any crime. The officers had no probable cause to continue detaining him at this point and then to handcuff him when they found a \$10 bill and a hat on the ground because they still had no specific indication that any crime had occurred. See Black v. State, 141 So. 3d 769, 770 (Fla. 2d DCA 2014) ("While [appellant's] actions may have been vaguely suspicious, they do not rise to the level of probable cause necessary for warrantless arrest.") (citing Wright v. State, 126 So. 3d 420, 424 (Fla. 4th DCA 2013)); Urrieta, 520 F.3d at 579 ("[W]e cannot uphold the district

court's highly nonspecific finding that the extended detention was justified because 'something else' illegal might have been going on in [appellant's] car."); United States v. Blair, 524 F.3d 740, 753 (6<sup>th</sup> Cir. 2008) ("Officer Holmes did not possess the reasonable, articulable suspicion of criminal activity necessary to extend the scope and duration of the stop.").

The trial court erred in denying the motion to suppress all evidence stemming from the illegal stop and seizure. See State v. Teamer, 39 Fla. L. Weekly S478 (Fla. July 3, 2014) ("Applying the exclusionary rule here would have the required deterrent effect."); Art. 1, §12; Fla. Const.; Amend. 4, U.S. Const. This Court should reverse for a new trial where all evidence flowing from the stop is suppressed.

**ISSUE III: THE TRIAL COURT COMMITTED REVERSIBLE ERROR BY REAPPOINTING ATTORNEY HERNANDEZ AFTER HIS REMOVAL FOR CAUSE, BY DENYING PASHA'S MOTIONS TO DISMISS HERNANDEZ AS STANDBY COUNSEL, AND BY TREATING HERNANDEZ AS PASHA'S ATTORNEY.**

Judge Tharpe removed Attorney Hernandez as standby counsel at a hearing on September 8, 2005, based on Pasha's motion alleging that Hernandez played a role in attempting to hide exculpatory evidence from him (S42/844-851). An actual conflict of interest existed between Hernandez and Pasha after the judge removed Hernandez in 2005. When Judge Fuente reappointed Hernandez as standby counsel after this Court remanded for a new

trial in 2010, Hernandez had a conflict of interest and an ethical duty to decline the reappointment on that basis. See 4-1.16(a), Rules Regulating Fla. Bar. "An attorney engages in unethical conduct when he undertakes a representation when he either knows or should know of a conflict of interest prohibiting the representation." The Florida Bar v. Scott, 39 So. 3d 309, 316 (Fla. 2010). "When burdened by a conflict of interest, counsel 'breaches the duty of loyalty, perhaps the most basic of counsel's duties' and, therefore, fails to provide effective assistance of counsel." Atley v. Ault, 191 F.3d 865, 869 (8th Cir. 1999) (citing Strickland v. Washington, 466 U.S. 668, 692 (1984)).

Pasha's 2005 allegation that Hernandez played a role in attempting to hide exculpatory evidence from him impugned Hernandez's integrity and tainted his reputation. The 2006 order granting Pasha's motion serves as a factual finding that the allegation was meritorious. Thereafter, requiring Pasha to cooperate with an attorney who had been removed for disloyal conduct was a violation of Pasha's right to counsel, right to self-representation, and right to due process under the U.S. and Florida Constitutions. Art. I, §§ 9, 19, Fla. Const.; Amends. 6, 14, U.S. Const.; Wood v. Georgia, 450 U.S. 261, 271 (1981) ("Where a constitutional right to counsel exists, . . . there is

a correlative right to representation that is free from conflicts of interest."); Cuyler v. Sullivan, 446 U.S. 335 (1980); Holloway v. Arkansas, 435 U.S. 475, 481 (1978)); see also Nixon v. Siegel, 626 So. 2d 1024 (Fla. 3d DCA 1993) (trial court erred by reappointing the public defender's office for retrial after public defender was originally allowed to withdraw based on conflict); Hill v. State, 134 So. 3d 721, 726-27 (Miss. 2014) (trial court erred by assigning attorney to serve as defendant's advisory counsel while, at the same time, allowing that attorney to withdraw as his counsel because of a conflict of interest.").

A defendant possesses a right to have conflict-free standby counsel because standby counsel must be (1) candid and forthcoming in providing technical information/advice, (2) able to fully represent the accused on a moment's notice, in the event termination of the defendant's self-representation is necessary, and (3) able to maintain attorney-client privilege.

State v. McDonald, 22 P.3d 791, 794-95 (Wash. 2001).

After denying Pasha's motion to dismiss Hernandez, Judge Fuente ordered that all of Pasha's communication with the court had to be channeled through Hernandez. (S27/477-478). This order, elevating Hernandez's status above that of standby counsel, impeded Pasha's access to the court, Art. I, § 21, Fla. Const., and infringed on his right to self-representation. See Faretta. Judge Fernandez perpetuated the error when she (1)

refused to reconsider Judge Fuente's order after he disqualified himself (7/1267-68), (2) repeatedly refused to allow Pasha to dismiss Hernandez (27/533;29/613), and (3) coerced Pasha into accepting Hernandez as his attorney in exchange for her promise to allow Hernandez to relitigate all of Pasha's pro se motions (See Issue I).

Attorney Hernandez perpetuated the error by denying Pasha's allegations of conflict. (S27/478). Pasha had informed the judge on June 7, 2012, that Hernandez had a conflict of interest and that Pasha was preparing a Bar grievance against him. (27/533). On the day of trial, just before the jurors were brought in to the courtroom, Hernandez told the judge that Pasha's Bar grievance was pending but he asserted that it had no significance.

MR. HERNANDEZ: . . . Just for the record, . . . .  
I did receive a bar grievance against me, filed by Mr. Pasha. It does not mention anything different than what he had already mentioned to the Court back in November.

And I have already responded. I will tell the Court, in my opinion, it does not affect in any way my ability to serve as standby counsel.

(S61/10).

There is no indication that the trial court or Hernandez ever advised Pasha that the reappointment of Hernandez was impermissible. It was Attorney Hernandez's responsibility to

obtain consent before undertaking to represent Pasha again after having been removed for cause. See The Florida Bar v. Dunagan, 731 So. 2d 1237, 1241 (Fla. 1999). In any case, a waiver of conflict-free counsel requires ensuring that the defendant knows of the right to obtain other counsel, which did not occur here. Larzelere v. State, 676 So. 2d 394, 403 (Fla. 1996); Lee v. State, 690 So. 2d 664, 668-69 (Fla. 1<sup>st</sup> DCA 1997).

Because there was an actual conflict and then a complete breakdown in communication between Pasha and Hernandez, the trial court was required to either allow Pasha to proceed without standby counsel or appoint different standby counsel to assist him. E.g., Smith v. Lockhart, 923 F.2d 1314, 1320-22 (8th Cir. 1991) (discussing sufficient cause for substitution of counsel). The error in forcing Pasha to proceed to trial with Hernandez at counsel table was a structural error for which a harmless error analysis cannot be applied. McKaskle v. Wiggins, 465 U.S. 168, 177 n. 8 (1984) ("The right [to proceed pro se] is either respected or denied; its deprivation cannot be harmless."); Thomas v. State, 785 So. 2d 626, 629 (Fla. 2d DCA 2001) ("the harmless error rule is not applied when a defendant is deprived of conflict-free counsel because 'any action the lawyer refrained from taking because of the conflict would not

be apparent from the record.'") (quoting Lee v. State, 690 So.2d at 668).

Although it is impossible to determine what effect Mr. Hernandez's presence had on the case, one can easily speculate that things would have been handled differently if the court had allowed Pasha to proceed without standby counsel or (preferably) with conflict-free standby counsel. For instance, at the September 21, 2012, status conference, Pasha was in a holding cell and was not brought into the courtroom until after the discussion between Hernandez, the prosecutor, and the judge was over. Hernandez never asked for Pasha to be brought out. (S33/578-582). Because Hernandez did not actually represent Pasha, this was effectively an ex-parte hearing. This record exemplifies why Pasha was frustrated in being forced to deal with Hernandez.

The very next hearing of October 1, 2012, also conducted ex parte, involved Hernandez's request for interim attorney fees. He sought a ruling that the case was unusual and extraordinary (for which he blamed Pasha), thereby justifying an interim payment (above the statutory cap) of \$19,820.<sup>12</sup> Judge Perry granted the fee request. (S34/584-589).

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<sup>12</sup> To justify the fee, Mr. Hernandez said: "Judge, this is a very involved case that it goes back, the discovery is huge because

Further, the prosecutor put on the record during the trial that he asked Hernandez (and Wise) to approach Pasha about the possibility of negotiating a plea in exchange for a sentence of life. (S65/601). It is impossible to say whether a conflict-free attorney would have been successful in negotiating a plea to life in this case, but it is clear that Hernandez was not in a position to do so, given the history of distrust between Pasha and him. The distrust was evident during the trial when Pasha stated that he did not want to talk to his standby counsel (S68/1102). The errors of (1) reappointing Hernandez after his discharge for cause, (2) elevating his status above that of standby counsel, and (3) requiring Pasha to go to trial with him under protest violated Pasha's Sixth Amendment and due process rights and require reversal for a new trial.

**ISSUE IV: THE TRIAL COURT COMMITTED REVERSIBLE ERROR BY ADMITTING THE 911 RECORDING AND BY DISTRIBUTING THE UNAUTHENTICATED TRANSCRIPT TO THE JURORS.**

(A) Admission of Exhibit 160

Pasha filed a pretrial motion to suppress and a motion in limine, and then at trial he objected to the admission of the 911

(..continued)

in fact Mr. Sinardi who is present here today tried it like 10 years ago and it came back on appeal because the defendant had insisted he wanted to represent himself and because he's representing himself this thing is taking forever to be resolved." (S34/586-87).

recording (State's exhibit 160), arguing that the exhibit was not the original recording and objecting on the basis that the recording was hearsay.

THE DEFENDANT: This is not the original tape.

THE COURT: Okay. All right. She's listened to that; is that correct?

MR. HARB: Yes.

THE DEFENDANT: That's not the original.

THE COURT: Okay. All right. Over your objection, we'll allow [exhibit] 160 to be introduced into evidence. The witness has indicated on the record that she has listened to the tape and that it is a fair and accurate representation of statements that she made to 911 that night.

THE DEFENDANT: Plus it's hearsay. I'm objecting on hearsay.

THE COURT: I'll overrule that objection.

(The bench conference concluded.)

MR. HARB: Your Honor, the State would renew its motion to move State Exhibit 160 into evidence.

THE COURT: You want to approach, Mr. Harb, a moment? You all want to approach?

(A bench conference was held, as follows:)

THE COURT: His last objection was hearsay. You want to respond?

MR. HARB: Yes. And that was subject of -- that was addressed in the motion to suppress,<sup>13</sup> and the State's position that this is an excited utterance.

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<sup>13</sup> The hearsay objection actually was not addressed by the trial judge during the motion to suppress hearings. See S80/731.

THE COURT: You want to lay that foundation so that I can make that determination now for the record?

MR. HARB: We'll get to that.

THE COURT: All right. I think he's got a legal objection. I think I need to -- I think it needs to be laid during the course of the trial as well. So I make that finding as well, that it meets the exception.

(S68/1039).

The trial court erred in overruling Pasha's objections. First, the recording introduced by the State was not simply the voices recorded during the 911 call; the exhibit contained a misleading introduction that was placed on the tape by law enforcement. According to the prosecutor, the introductory remarks on the recording "were those of the communication technician from the Hillsborough County Sheriff's Office and not the words of the 911 caller." (5/966). This unidentified person never testified and never authenticated this part of the recording, which is the required condition precedent to admissibility. See § 90.901, Fla. Stat.

The recording consists of inadmissible hearsay and double hearsay for which no exception applies.<sup>14</sup> Before the recording was played, Gigi Sanchez testified that she called 911 because her

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<sup>14</sup> The standard of review for admissibility of evidence is abuse of discretion, however whether a statement falls within the statutory definition of hearsay is a legal question subject to de novo review. K.V. v. State, 832 So. 2d 264, 265-66 (Fla. 4th DCA 2002).

husband had phoned her to say that he had seen a man with blood on him walking on the street. She called 911 after her husband picked her up in his truck. She had not seen the man herself until after she was inside the truck driving with her husband, which was during the conversation with the 911 operator. Jose Sanchez confirmed this when he was cross-examined.

(S71/1527-29,1533). Gigi Sanchez was not relaying what she herself had seen, although she made a false statement to that effect to the 911 operator; she was, in fact, relaying what her husband had told her about seeing a man walking past the maintenance office.

Hearsay is "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." § 90.801(1)(c), Fla. Stat. (2007). Hearsay is inadmissible, unless allowed by an exception, § 90.802, Fla. Stat. (2007). Thomas v. State, 993 So. 2d 105, 106 (Fla. 1<sup>st</sup> DCA 2008). Hearsay within hearsay is inadmissible unless "each part of the combined statements conforms with an exception to the hearsay rule." § 90.805, Fla. Stat.

On the recording, Gigi tells the 911 operator that she "just saw a guy" walking who is "dressed in white, but he's full of blood . . . I mean he's just soaked in blood." This statement was not true, because as she explained during her in-court testimony

(and as her husband explained) she was relating what her husband had seen and told her. A similar situation occurred in Walden v. State, 17 So. 3d 795 (Fla. 1<sup>st</sup> DCA 2009), where a woman called 911 to report a robbery. She made a false statement during the call as to what another person saw when the robber was leaving the scene. The First DCA concluded that the trial court erred by admitting the 911 tape because the caller gave a description of a car and the robber that was hearsay. 17 So. 3d at 797.

Gigi's statements do not qualify as an excited utterance because she denied that she was excited when she made the 911 call.

A. Well, my husband picked me up; and as he picked me up, we were already in the truck. I was inside the truck. We were driving back. That's when I saw the gentleman with blood on him, walking; and I was explaining that to the 911.

\* \* \* \*

Q. Were you excited?

A. Not excited, no.

Q. Okay. Were you concerned?

A. Very concerned.

(S68/1043). Gigi repeated during cross-examination that she was not excited when she made the call, and she said that neither was her husband. (S68/1092).

An excited utterance is a statement "relating to a startling

event or condition made while the declarant was under the stress of excitement caused by the event or condition.” § 90.803(2), Fla. Stat. (2006). Generally, the statement must be made while the declarant is under the stress of the startling event and without time for reflective thought. See Hutchinson v. State, 882 So. 2d 943, 951 (Fla. 2004), abrogated in part by Deparvine v. State, 995 So. 2d 351 (Fla. 2008). If sufficient time passed for reflective thought, the proponent for admission of the statement must show that reflective thought did not occur. See id.; Williams v. State, 967 So. 2d 735, 748 (Fla. 2007).

[T]he classic “excited utterance” is a statement elicited, almost involuntarily, by the shock of what the declarant is immediately witnessing (“My God, those people will be killed!”). See id., at 368–369. It is the immediacy that gives the statement some credibility; the declarant has not had time to dissemble or embellish.

Navarette, 134 S. Ct. at 1694 (2014) (Scalia, J., dissenting).

Gigi made the call out of “concern” for what her husband had told her. “Concern” is defined as “an uneasy state of blended interest, uncertainty, and apprehension.” (www.merriam-webster.com). In other words, concern necessarily involves reflective thought.

Throughout the call, even after she views the man, she is drawing conclusions about the person based on what her husband told her. For instance, at one point, she says that the man is

"dangerous," although she had no factual basis for that conclusion. Pasha's contemporaneous objection to this assertion was improperly overruled. (S68/1047-48). A witness cannot testify to a matter "unless evidence is introduced which is sufficient to support a finding that the witness has personal knowledge of the matter." § 90.604, Fla. Stat. Furthermore, Gigi said during the call that the man is "up to no good," although when asked by the operator she admitted that she did not know where the blood was from, whether the man was bleeding or had been in a fight. (S68/1049).

Jose Sanchez, speaking Spanish on the recording, witnessed a person he considered suspicious, but he never witnessed a crime, and he did not know what was going on with the man he saw walking past the maintenance building. He never witnessed any startling event that would justify admitting his statements under the excited utterance exception. Jose thought the man looked confused. He did not know if the man had been in a fight, or if he had cut himself. Under these circumstances, the State did not and could not have met the predicate for admission of Jose's statements under the excited utterance exception to the hearsay rule. Even if Jose's sighting of the man with blood on him is considered a startling event, there is no legal basis to impute what Jose saw to Gigi in order to justify admitting her hearsay

statements on the 911 call. The trial court erred in overruling the hearsay objection and allowing the recording to be played to the jury because the voices on the recording are out-of-court hearsay and double hearsay offered for the truth asserted.

Pasha objected repeatedly to the recording and the transcript on the ground that the recording was tampered with or modified. The tape was modified when the voice-over description was added by the unknown person. An unidentified voice of a law enforcement employee introduces the call, describes the date and time of the call, and the "original signal code 050." That signal code represents a homicide, but testimony by the officers revealed that the 911 call was classified as a suspicious person report. The call was reclassified as a report of a homicide by law enforcement in the subsequent preparation for litigation.

The recording was not properly authenticated by the person who voiced the introduction. The introduction added to the 911 call is testimonial hearsay because it was produced by law enforcement in anticipation of litigation. Pasha was denied his right to confront the person who made the introduction. The admission of the testimonial statements by the unidentified person violated the hearsay rule and Pasha's confrontation rights. See Bullcoming v. New Mexico, 131 S.Ct. 2705 (June 23, 2011). For all of these reasons, the error of admitting exhibit 160 requires

reversal for a new trial.

(B) Distribution of the Transcript

The trial court permitted the prosecutor to distribute an unauthenticated, uncertified, and inaccurate transcript of the 911 call to each juror. A heading appears on each page of the transcript in bold capital letters: "SHERIFF'S OFFICE HILLSBOROUGH COUNTY, FLORIDA," with subtitle "9-1-1 Call, Case #02-081848, Homicide." (S78/695-701). The transcript provided to the jury is hearsay and it is not a business record; it was prepared by law enforcement four years after the event in anticipation of litigation.<sup>15</sup> The document at issue was not presented to the jury as a demonstrative aid; it was used as evidence, and it was put into the hands of each juror during the trial without any cautionary instruction to limit its use.

The judge, at the request of the State, allowed the distribution of copies to the jurors for reading while the recording was being played.

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<sup>15</sup> At trial, Pasha called Pam Hartman, the Hillsborough County Sheriff's Communications Bureau secretary in 2002 and, later, the 911 custodian. (S75/2171-76). She testified that a 911 call was kept on the computer for one year, after which "it automatically went away." (S75/2173,2178). With regard to a transcript made years after a call, she said, "I'm sure the detective requested the call, a copy of the call" at the time the incident happened. (S75/2174). After Hartman testified, Pasha unsuccessfully renewed his objection to the 911 recording based on the lack of a chain of custody. (S75/2175)

THE COURT: Okay. All right. I would go ahead and admit No. 160 into evidence, the 911 recording.

MR. HARB: With the Court's permission --

THE COURT: You may publish it.

MR. HARB: -- the State would like to publish it.

THE COURT: Yes.

MR. HARB: Your Honor, we do have the transcripts of the 911 call that was previously provided to Mr. Pasha.

THE COURT: You provided those transcripts to Mr. Pasha?

MR. HARB: Yes, we did, Your Honor. And I will give him another copy. May we use these transcripts as -- and I'll provide the Court -

THE COURT: Yes. Yes.

MR. HARB: -- and the court reporter. Use the transcripts as an aid to the jurors; and those copies will be collected afterwards, Your Honor?

THE COURT: Yes, please. Are we playing it?

(Publishing State's Exhibit 160 . . .

(S68/1044-45).

There was no way for the jury to know that the transcript was not evidence. See Martinez, 761 So. 2d 1086 ("[T]rial courts should give a cautionary instruction to the jury regarding the limited use to be made of the transcript."). The bailiff collected the copies after the tape was played and returned the copies to the prosecutor, who put them in his files and took them with him out of the courtroom. (S68/1053;S79/706).

“In cases tried by a jury, a court shall conduct proceedings, to the maximum extent practicable, in such a manner as to prevent inadmissible evidence from being suggested to the jury by any means.” § 90.104, Fla. Stat. (2003). Florida Standard Jury Instructions 2.6, 2.10, and 2.11 provide the guidance that the jury should be given before the jurors are handed a transcript of a recording in English or in a foreign language. “[T]rial courts should exercise extreme caution before allowing transcripts of recordings to be viewed by the jury.” Martinez v. State, 761 So. 2d 1074, 1086 (Fla. 2000). This Court has recognized the danger in providing a jury with a transcript as a demonstrative aid to understanding a recording. “The goal is for the trial court to balance the benefit of giving the jury an aid to understanding the tape against the danger of allowing an unadmitted transcript to become the evidence upon which the jury relies where neither the judge nor jury would be able to verify the accuracy of what is contained on the transcript.” Martinez, 761 So. 2d at 1085. This Court in McCoy v. State, 853 So. 2d 396, 405 (Fla. 2003), explicitly reaffirmed the guidance of Martinez, mandating that “trial courts make an independent pretrial determination of the accuracy of transcripts, and give a cautionary instruction to the jury regarding the limited use to be made of the transcript, prior to employment of these demonstrative

aids during trial.” In Davis v. State, 121 So. 3d 462, 491 (Fla. 2013), this Court concluded that a trial court abused its discretion in failing to follow this Court's Martinez instructions in admitting a transcript as a demonstrative aid.

Because here the transcript was not authenticated under the guidelines provided by this Court in Martinez, there was no testimony pertaining to the accuracy of it. When questioned at trial, Gigi Sanchez testified that she had not seen the transcript.

Q. [by Prosecutor] The 911 call that you made, have you had occasions in the past to listen to the recording of the 911 call?

A. [by Ms. Sanchez] Yes.

Q. Have you had occasions to see a transcript of the 911 recording, where there's a piece of paper that says -- basically outlines what the questions and answers? Do you know what I'm talking about?

A. No, I'm sorry.

(S68/1035). Interspersed throughout the recording, the Sanchezes are speaking to each other in Spanish, (S68/1053; S80/753), but the distributed transcript reflects that English is spoken throughout. The transcript is not an accurate reflection of the recording because it contains an unofficial Spanish-to-English translation made by an employee at the sheriff's office.

The jury was entitled to an accurate translation made by a

competent and impartial translator. See Art. 2 § 9, Fla. Const.; Fernandez v. State, 21 So. 3d 155, 157 (Fla. 4<sup>th</sup> DCA 2009) ("An interpreter is required . . . when audio recordings in Spanish are admitted into evidence."); Ortega v. State, 721 So. 2d 350, 351 (Fla. 2d DCA 1998) ("[I]t was error for the trial court to allow a law enforcement officer to translate, over objection, Ortega's videotaped statements in Spanish."); Hutchens v. State, 469 So. 2d 924, 925 (Fla. 3d DCA 1985) (holding that trial judge erred in allowing jury to listen to tape recording in Spanish without having it translated into English by an interpreter sworn to give a faithful and accurate translation).

Pasha objected to the typed transcript of the 911 call in his written motion to suppress. (S50/2330-31). His oral pretrial objection to the transcript was summarily denied when raised at the pretrial hearing of March 3, 2011. (S80/747-48). Pasha objected to the transcript on the meritorious ground that it was not a certified transcript. (Id.)

When a transcript is objected to, the trial court should make an independent pretrial determination as to the accuracy of the transcript after hearing from people who can testify as to the accuracy. The judge overruled Pasha's objection without getting a response from the State and without making any inquiry into the origination or accuracy of the transcript.

THE DEFENDANT: My objection is clear with this transcript. This transcript here is not the same -- this -- there have been four different transcripts made of this 911 tape. Three have been certified. And this one here by Mr. Jay King has not -- Sgt. Jay King has not been certified. The three that have been certified don't relate to this one by Jay King. There's two different tapes. The one that's been certified by Miss Nicole Snyder on two separate tapes and one is certified by Miss Cynthia Taylor on another one and they are in conflict with the one that's made by Mr. Jay King. And that's two different tapes I'm complaining about so that's my concern.

THE COURT: Is that an objection or is that a concern?

THE DEFENDANT: Yes, sir.

THE COURT: What's your objection? Right now we're going to listen to the tape. What's your objection?

THE DEFENDANT: My objection is I'm still not sure what tape he going to play.

THE COURT: We're going find out in a minute. You're going to listen to it. You're going to go by this transcript. This is not the evidence. What is evidence is the tape.

THE DEFENDANT: It's the tape?

THE COURT: That's right. This is just to guide us to help us. So let's hear the tape. Proceed.

(AUDIO TAPE PLAYED)

(S80/747-748).

At trial, before the 911 tape was played for the jury, the prosecutor produced the same transcript used at the motion to suppress hearing. Pasha's pretrial objection to the use of the transcript preserves this issue for appeal. See § 90.104(1), Fla. Stat. (2009) (providing that pretrial ruling on admissibility of

evidence preserves objection for appellate review); McWatters v. State, 36 So. 3d 613, 627 (Fla. 2010) (discussing the application of § 90.104(1)). Pasha renewed his pretrial objections during the trial. (S67/952;S68/1038) He was representing himself during both the suppression hearing and the trial, and this Court affords pro se litigants leniency in technical matters. Wilcox v. State, 143 So. 3d 359, 373 (Fla. 2014) (“Wilcox did enough, although it was not very much, to indicate his objection . . . and, therefore, sufficiently preserved the issue for appeal as a pro se litigant.”).

In any event, it was fundamental error for the judge to allow the distribution of a transcript to jurors without following any of the Martinez procedures. The judge allowed the prosecutor to distribute to each juror extra-record evidence from an official law enforcement source, resulting in an impermissible intrusion into the jurors’ deliberative process. “An impartial jury, selected and kept free from all outside or improper influences, has always been regarded by our courts as necessary to a fair and impartial trial.” Owens v. State, 68 Fla. 154, 67 So. 39 (1914) (quoting Buxton v. State, 14 S.W. 480 (Tenn. 1890)); see also Sayih v. Perlmutter, 561 So. 2d 309, 312 (Fla. 3d DCA 1990) (“Jurors should be free of evidence not received during trial.”).

The transcript was prejudicial for a number of reasons. The

heading and the first paragraph have nothing to do with the words spoken on the 911 call. The heading identifies the Hillsborough County Sheriff's Office, a case number, and the designation: "Homicide," even though there was no report or knowledge of a homicide at the time the 911 call was made. By labeling the 911 call as relating to a homicide, instead of a suspicious person, the transcript is documentary evidence supporting the State's circumstantial case on the issue of identity, to the detriment of the defense. The document heading, "Sheriff's Office Hillsborough County, FL" in all capital letters on every page, constitutes an official imprimatur that is particularly prejudicial in a case where the defense is based on challenging the competency of the investigation undertaken by that office. The sheriff's office played a visible role in the courtroom; the courtroom bailiffs wear the uniform of the Hillsborough County Sheriff's Office and have charge of the jurors throughout the trial. A bailiff collected the copies from each of the jurors. (S68/1053). These circumstances lent unmerited credence to the transcript and bolstered its significance. The distribution of it to the jurors was harmful error that requires reversal for a new trial.

**ISSUE V: THE TRIAL COURT COMMITTED REVERSIBLE ERROR BY DENYING THE DEFENSE REQUEST FOR A STANDARD ALIBI INSTRUCTION.**

During the charge conference, Pasha's request for the

standard alibi instruction<sup>16</sup> was opposed by the prosecution and denied by the trial judge. (S76/2318-2319). The trial court's denial of the request for the standard instruction was error that requires reversal for a new trial. "A trial court must instruct the jury on the law applicable to alibi if there is evidence to support such instruction." Ramsaran v. State, 664 So. 2d 1106, 1107 (Fla. 4<sup>th</sup> DCA 1995); see also Long v. State, 42 Fla. 509, 28 So. 775, 780 (Fla. 1900). "A defendant is entitled to have the jury instructed on the law applicable to his theory of defense if there is any evidence introduced to support the instruction, however disdainfully the trial judge may feel about the merits of such defense from a factual standpoint." Williams v. State, 395 So. 2d 1236, 1238 (Fla. 4<sup>th</sup> DCA 1981) (citing Laythe v. State, 330 So. 2d 113, 114 (Fla. 3d DCA 1976)).

An alibi instruction is appropriate when there is evidence that a defendant is not at the scene, even if the defendant is near the scene. See Rostano v. State, 678 So. 2d 1371 (Fla. 4<sup>th</sup> DCA 1996) (explaining that the defendant was entitled to have the jury consider whether he was "precisely at the scene of the

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<sup>16</sup> "An issue in this case is whether defendant was present when the crime allegedly was committed. If you have a reasonable doubt that the defendant was present at the scene of the alleged crime, it is your duty to find the defendant not guilty." Fla. Standard Crim. Jury Instr. 3.6(i)

crime.'") (citing Henderson v. United States, 619 A.2d 16 (D.C. 1992)). In Henderson, the defendant was entitled to an alibi instruction where he maintained that he was in his apartment upstairs from a lobby where the crime was committed. The Rostano court, quoting Henderson, noted that "[a]libi instructions are not a precious commodity to be hoarded by the trial court; they should be granted liberally when there is any evidence to support them." 678 So. 2d 1373. In Adams v. State, 28 Fla. 511, 542, 10 So. 106, 114 (1891), this court stated that "evidence in support of an *alibi* need not be absolutely clear. It is sufficient if there is enough to produce in the minds of the jury a reasonable doubt as to the presence of the prisoner at the scene of the killing. Neither do we think that the evidence of an *alibi* should in any case make it absolutely impossible for the prisoner to be present at the killing."

The prosecutor opposed the giving of an alibi instruction, arguing that Pasha was not entitled to the instruction because he had not filed a notice of alibi. (S76/2318) That was a specious argument. See Ivory v. State, 718 So. 2d 233, 234 (Fla. 4<sup>th</sup> DCA 1998) (holding that a defendant's failure to follow the notice provisions of Florida Rule of Criminal Procedure 3.200 does not authorize a trial court to refuse a requested alibi instruction as a sanction). And the prosecutor also argued that the nature of

the defense did not support an alibi instruction (S76/2318). This is simply a distortion of Pasha's trial testimony because he clearly testified that he was not present when the crime occurred.

The failure to give a properly requested standard alibi instruction is rarely harmless error because an alibi instruction advises the jury how it is to evaluate the defense in terms of the burden of proof. The standard alibi instruction explains that it is not necessary for the defendant to prove the defense of alibi beyond a reasonable doubt. Hudson v. State, 381 So. 2d 344, 345-46 (Fla. 3d DCA 1980). During the State's closing argument, the prosecutor attacked Pasha's exculpatory testimony as not credible. A reasonable juror might have thought, given the argument, that Pasha had the burden to prove his alibi beyond a reasonable doubt. The prosecutor said:

Remember, we talked about, during jury selection, the State does not have to prove to you the motive in this case. You haven't heard any evidence what the motive was.

That motive will remain with Khalid Pasha. He's the only one who can tell you why he murdered Robin Canady and why he murdered Raneesha Singleton.

\* \* \* \*

Well, this is about as close as the State of Florida can come to proving a case beyond a shadow of a doubt.

Now, Mr. Pasha has come up with something that may raise some kind of doubt if you force yourself, if you imagine, if you speculate. Mr. Pasha might raise one of those doubts in your mind. But the judge is going to define reasonable doubt

for you. . . . she's going to tell you what reasonable doubt is not. She's going to tell you that reasonable doubt is not a forced doubt, or a speculative doubt, or an imaginary doubt.

(S76/2312-14). The argument shows that the burden of proof, reasonable doubt, and Pasha's credibility were the central issues. It was Pasha's right to have the jury properly instructed that he was not required to prove his defense beyond a reasonable doubt, but that if the evidence was sufficient to raise in the mind of the jury a reasonable doubt that he was present when the alleged crime was committed, that was all the law required to entitle him to an acquittal. See Long v. State, 42 Fla. 509, 525-26, 28 So. 775, 780 (1900). The prosecutor incorrectly told the jury in closing argument that there was no other law in the world that applied to the case: "[W]hat's contained in these instructions is all the law that applies to this case. There is no other law than what is in these instructions that you need to know to reach your verdict. . . . That is all the law in the world that applies to this case." (S76/2288-89). Because the jury did not, in fact, receive all the law that applied to the case, a new trial is required.

**ISSUE VI: THE TRIAL JUDGE COMMITTED REVERSIBLE ERROR WHEN, MIDWAY THROUGH THE GUILTY-PHASE, SHE IMPRESSED ON THE JURORS THE NEED FOR THEM TO RECONVENE LATER FOR A PENALTY PHASE.**

Before the trial started, the defense asked for a two-week

hiatus between the guilt and penalty phases, and the judge granted the request. The judge initially told the prospective jurors that the trial would begin the following week, and then be interrupted for a two-week hiatus "because of some legal issues and witness issues." (S61/143-44) She explained that after the two-week break the jurors would come back for another two or three days of testimony on February 11<sup>th</sup>, 12<sup>th</sup>, and at most, 13<sup>th</sup>. (S61/144,146; S62/195, 263).<sup>17</sup>

After excusing a number of the jurors for unavailability, the judge explained the charges to the remaining potential jurors and gave the jurors an extensive explanation of the "guilt phase" and the "penalty phase." (S63/348-357) The judge said she expected to take a two-week break between the two phases of the trial.

(S63/348-49) These remarks were made on January 15, 2013, during jury selection. Then, in the middle of the defense's presentation of its case, on January 24, 2013, the trial judge, made other remarks along the same lines. (S76/2209-13)

The judge contemplated telling the jury how the afternoon was going to play out, so that the jury could make arrangements for the evening.

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<sup>17</sup> The judge did not initially tell the jurors that the second phase was conditional; her comments indicated that it was inevitable. See, e.g., S62/263 (describing in detail the second phase that "would begin" on February 11<sup>th</sup>).

THE COURT: . . . Mr. Pasha, we just brought this jury in 15, 20 minutes ago. I want to at least let them know where we are at in terms of the trial. . . It is my intention to tell them, we'll take a 10-minute recess, and then the Court intends on reading a stipulation. At which time, that stipulation is read. After the stipulation is read, it is your intention of resting?

THE DEFENDANT: That's my intention.

THE COURT: Then I'll advise them of that and tell them we're going to go directly into closing argument. Any objection to that?

THE DEFENDANT: No objection.

(The bench conference was concluded.)

(S76/2208-09) The ensuing discussion went far beyond that contemplated and agreed to by Pasha. The judge said that deliberations would begin the next morning. An unidentified juror asked whether she could make plans to leave the area next weekend. In response, the judge began discussing the need for all the jurors to return for the penalty phase.

THE COURT: It's my intention again -- you all are going to be coming back on February 11th and 12th. Possibly coming back. I don't know. But if you are required by law to come back, let's put it that way, it will be on February 11th, February 12th and maybe spill over a little bit into the 13th. Yes, ma'am.

A JUROR: I know we still haven't said who the alternates are versus the jurors are. We still required to come tomorrow?

THE COURT: Oh, absolutely. Absolutely. The alternates will not be absolutely released from this case until the case is completely over, and that's going to be somewhere after February 11th, 12th, 13th. The alternates still remain active on the case if we even get to that portion of the

case. Again, I always caveat it with "if we even get to that portion." But yes, everybody needs to come back tomorrow morning at 8:30.

\* \* \* \*

THE COURT: You all need to come back. Everybody needs to come back at 8:30. Everybody needs to come back at 8:30, but only twelve will go back into the jury room to deliberate.

A JUROR: So four of us will be going home?

THE COURT: That's correct.

JUROR: Those four know who they are, we still have to come back the 10th, 11th and 12th?

THE COURT: The 11th, 12th and 13th, yes.

A JUROR: Even though we had no decision on the case?

THE COURT: Yes, you still come back because of what I explained to you during the jury selection process. That part of the case, if it's even required, it's going to depend on the verdict that's brought, but that part of the case, the alternates need to listen to the evidence as well because, once again, over the course of those two days, there may be a juror who becomes ill or has a family emergency and they have to be able to step in.

\* \* \* \*

THE COURT: Nobody make plans for the 11th, 12th, and 13th. How's that?

(S76/2210-13).

When the court reconvened the next morning, January 25, 2013, Pasha moved for mistrial on the basis that the judge's remarks regarding the penalty phase implied that the judge expected a guilty verdict.

THE DEFENDANT: I have a complaint to lodge, an oral motion to put on the record. I would move for a motion for mistrial. When the jury asked the Court yesterday about if they could go on a vacation on the weekend of the 11th, you said no, nobody can go, nobody can go, make sure everybody is here. The implication I received from that is that the defendant would automatically be found guilty. It implies guilty is already to be expected. Rather than say, wait until we get to that point and I'll let you know.

THE COURT: At this juncture, Mr. Pasha, I had indicated to the jury during jury selection that they needed to continue to make themselves available for February 11th, 12th and 13th and they need to continue to make themselves available for February 11th, 12th, and 13th because I don't know what's going to happen with respect to the verdict and the guilt phase. . . . They need to continue to make themselves available because nobody knows what verdict this jury is going to reach, but your objection is noted for the record.

(S77/2323-24).

The trial court erred by overruling Pasha's objection and motion for mistrial. Because the judge's remarks presumed that a guilty verdict would be forthcoming, the judge violated the statutory proscription against judicial comment on the evidence. § 90.106, Fla. Stat. (2013) ("A judge may not sum up the evidence or comment to the jury upon the weight of the evidence, the credibility of the witnesses, or the guilt of the accused."). By indicating that she anticipated reconvening for a penalty phase, she expressed her opinion of Pasha's guilt. See State v. Griffin, 261 S.E.2d 292, 294 (N.C. 1980) ("[T]he judge's premature remarks about sentencing assume that the jury has already reached a guilty

verdict, and leaves little doubt that the judge expects the jury to find the defendant guilty. Such an assumption . . . amounts to an unwarranted expression of opinion on defendant's guilt and thereby encourages the rendering of a guilty verdict."). The judge's remarks had the same effect as a formal instruction and require a reversal. See Raulerson v. State, 102 So. 2d 281, 285-86 (Fla. 1958).

Even unintentional remarks by a judge can destroy the impartiality of a trial "[w]here such comment expresses or tends to express the judge's view as to the weight of the evidence, the credibility of a witness, or the guilt of an accused." Hamilton v. State, 109 So. 2d 422, 424 (Fla. 3d DCA 1959). "The dominant position occupied by a judge in the trial of a cause before a jury is such that his remarks or comments, especially as they relate to the proceedings before him, overshadow those of the litigants, witnesses and other court officers." Id.

While it may be logistically necessary for a judge to discuss during voir dire the schedule for the penalty phase in order to gauge availability, e.g., Wyatt v. State, 71 So. 3d 86 (Fla. 2011), it is in no way appropriate for the judge to discuss the schedule for the penalty phase during the presentation of evidence, particularly after the State has rested and the defense is still presenting its case. The inescapable conclusion for the

jurors to draw from the remarks was that the judge considered a guilty verdict to be inevitable or, at least, a very good possibility. These remarks not only violated section 90.106, they violated Pasha's right to due process under the Fourteenth Amendment because they destroyed any semblance of impartiality and fairness in the proceedings. The error requires reversal for a new trial.

**ISSUE VII: THE TRIAL COURT ERRED IN OVERRULING THE DEFENSE OBJECTION TO GRUESOME AND INFLAMMATORY PHOTOGRAPHS THAT WERE NOT RELEVANT TO A DISPUTED ISSUE.**

In order to be relevant and admissible, "a photo of a deceased victim must be probative of an issue that is in dispute." Almeida v. State, 748 So. 2d 922, 929 (Fla. 1999) (emphasis in opinion); see also Jennings v. State, 123 So. 2d 1101, 1127 (Fla. 2013); Seibert v. State, 64 So. 3d 67, 88 (Fla. 2010); Smith v. State, 28 So. 3d 838, 861 (Fla. 2009). Pasha moved in limine to exclude gruesome and inflammatory photographs of the deceased. (3/492;15/7;S67/997). He also made a contemporaneous objection at trial when the State introduced photographs of the victims (S69/1179-80). The court overruled the objection and allowed in graphic photos, showing bloodied bodies with extensive injuries, and gruesome morgue photographs that served no purpose but to shock and inflame the jury. (Scene:13/2319,2321,2323,2325,2349,2351,2353,2355;

Morgue:13/2327,2331,2333,2335,2339,2343,2357,2363,2365,2367,  
2369,2371,2373,2375,2377).

It was error to admit the photographs because the State and Defense had entered into a stipulation that the trial court read to the jury telling it that the two women were killed on that day and in that location. (S69/1155-58,1165-66). Pasha's opening statement made clear that the only disputed issue in this case concerned the identity of the perpetrator. Because the defense did not dispute the manner of death, the gruesome crime scene and morgue photographs of the women were "gratuitous." Almeida, 748 So. 2d at 930. They served no purpose but to evoke horror and anger toward the person who was on trial. Because the gruesome and irrelevant photos created an unacceptable risk of influencing the jury's decision on the only contested issue, a new trial should be granted.

**ISSUE VIII: THE TRIAL COURT MADE A HOST OF ERRONEOUS EVIDENTIARY RULINGS THAT INDIVIDUALLY AND CUMULATIVELY SERVED TO DEPRIVE PASHA OF A FAIR TRIAL.**

The following rulings by the trial judge are each prejudicial error. When considered cumulatively, it is abundantly clear that the rulings reflect a judicial bias in favor of the prosecution and a denial of the right to a fair trial.

**(a) Refusal to Instruct Hostile Witness to Avoid Nonresponsive Answers.**

Jose Sanchez was a key State witness who testified that he saw Pasha walking with a knife covered in blood on the night of the murders, (S70/1416), although Pasha testified that he never carried a knife that night (S76/2259-61). Sanchez was hostile to Pasha's questioning on cross-examination when questioned about his ability to perceive and recall the events of that night. For instance, when Sanchez testified that "[y]ou don't have to be a psychiatrist to tell when somebody is excited, hungry, running away or if he committed a crime and he's trying to get away." (S70/1442). Pasha followed up with, "Are you saying that this person that you saw had committed a crime?" Sanchez responded, "Well, I don't know if he did commit a crime. I didn't get to know that until after . . ." (S70/1442-43). When asked how far away he was when he first viewed Pasha that night, he said, "If you give me the number then you were there; it was you." (S70/1432). He claimed lack of memory regarding his deposition and many details of the events. (S70/1434,1437). The trial judge hindered Pasha's attempts to refresh his recollection and to impeach him with his deposition. (S70/1444-46). When Sanchez claimed no recollection of his deposition even after Pasha attempted to refresh his memory with a passage, (S70/1447), Pasha asked about Jose's testimony at the prior trial. He gave a hostile response: "I've participated, come here so many times that I don't remember. But what I do

remember is what he did." (S71/1504). He repeated this theme when questioned about the distance between him and Pasha that night. Pasha asked the judge to instruct the witness to just answer the question and the judge refused his request:

Q. [by Mr. Pasha] . . . you stated it was 25 meters from the man?

A. [by Mr. Sanchez] Approximately. I'm sure it could be 25, 50, but what I am sure is that I saw him.

THE DEFENDANT: Your Honor, would the State ask the witness to stick to the question and stop saying things that I didn't ask him?

THE COURT: You can ask him another question, Mr. Pasha.

THE DEFENDANT: Excuse me?

THE COURT: I'm not going to admonish the witness. Okay.

(S71/1515). Jose Sanchez then continued to answer Pasha's questions with nonresponsive statements, such as: "It's been a long time since that happened. I don't have all the documents to be able to study it. But what I do remember that I will never forget, your face and what you did." (S71/1516-17). When Pasha complained to the judge about this nonresponsive statement, the judge responded, "He answered your question." (S71/1517). Pasha continued to complain about the witnesses nonresponsive answers. (S71/1518). The witness continued with boldness, at one point asking Pasha, "Why didn't you stop there and ask me why was I following you if you had not committed any crime?" (S71/1524).

It was error for the trial judge to refuse Pasha's request to admonish the witness as to nonresponsive answers that injected improper opinion testimony as to Pasha's guilt.

**(b) Refusing to Curtail Improper Opinion Testimony**

In addition to refusing to admonish Jose Sanchez when he offered improper opinion testimony of Pasha's guilt, as shown above, the judge overruled Pasha's objection when Gigi Sanchez offered an opinion of Pasha's dangerousness on the 911 call (S68/1047-48). "We find '[i]t is clear that error is occasioned where a witness, including a lay witness, is permitted to offer her opinion about the guilt of the defendant.'" Martinez v. State, 761 So. 2d 1074, 1079 (Fla. 2000) (quoting Zecchino v. State, 691 So. 2d 1197, 1198 (Fla. 4<sup>th</sup> DCA 1997)). The improper lay witness opinion testimony that the jury heard was reinforced by the prosecutor's improper expressions of his personal opinion discussed below in Issue IX.

**(c) Overruling Objections to Leading Questions**

The trial court allowed the prosecutor to ask leading questions on direct examination, overruling Pasha's objections, in violation of section 90.612, Florida Statutes. (S71/1567). When Gigi Sanchez testified, Pasha's initial objection to leading questions was overruled. (S68/1057). The prosecutor continued to lead and then after Gigi testified that she was not able to see

the object that Pasha was carrying in his hand that night, the prosecutor led her to say that it looked like a knife. (S68/1068).

**(d) Refusing to Allow Targeted Impeachment Evidence**

Pasha should have been given wide latitude to cross-examine Jose Sanchez when he testified that he did not remember giving a statement at a hearing on October 29, 2007 (S71/1504). Pasha attempted to admit the prior statement to impeach Sanchez's in-court testimony (S71/1558). The State objected and the trial court did not allow Pasha to admit the targeted impeachment evidence, a two-page excerpt of Jose's prior testimony, ruling instead that Pasha had to admit into evidence the entire transcript of the prior trial testimony in order to impeach him on one point (S71/1551, 1559-63).

Pasha had the right to impeach the witness with his prior testimony, and then because Sanchez claimed to have no memory of it, to introduce extrinsic evidence of the statement. See §§ 90.608, 90.614(2), Fla. Stat.; Pearce v. State, 880 So. 2d 561 (Fla. 2004); Elmer v. State, 114 So. 3d 198, 202 (Fla. 5<sup>th</sup> DCA 2012); K.P. v. State, 90 So. 3d 890 (Fla. 2012); MBL Life Assur. Corp. v. Suarez, 768 So. 2d 1129, 1134-35 (Fla. 3d DCA 2000). The trial court erred by refusing to allow Pasha to admit that portion of the prior testimony that was relevant as a prior inconsistent statement. See Pugh v. State, 637 So. 2d 313 (Fla. 3d DCA 1994);

Jenkins v. State, 586 So. 2d 1334 (Fla. 3d DCA 1991); Hills v. State, 428 So. 2d 318 (Fla. 1<sup>st</sup> DCA 1983).

**(e) Admission of Inaccurate Crime Scene Diagram**

The trial court erred in admitting exhibit 156 over defense objection, limiting cross-examination with respect to the accuracy of the exhibit, and refusing to allow the defense to proffer excluded testimony going to the reliability of the exhibit. (S67/969-72). The prosecutor introduced Exhibit 156, a large drawing purporting to represent the crime scene, through Deputy Chancey, who did not prepare the diagram (S67/969-70). Pasha objected, stating: "There is no accuracy in the drawing. It's not the total station, the background, and does not depict the area of the cul-de-sac for the total station and formation of the blood and the blood stain." (S67/970). The court overruled the objection, stating that Pasha could cross-examine with respect to the inaccuracies. (S67/970).

The prosecutor used the diagram during the testimony of the crime scene detective, Carolyn Service. (S69/1187). The diagram reflects that it is "the total station." But when cross-examined, Ms. Service conceded that the diagram was not an accurate reflection of the distance between objects and it was not the total station. (S69/1220-1223). Pasha unsuccessfully renewed his objection to the diagram, (S69/1221-1222), and questioned whether

the diagram "could make people believe that anything could be anywhere because there is nothing to show where things really were on this exhibit?" The State objected to the form of the question. The trial judge sustained the objection and Pasha moved to proffer Ms. Service's answer. The trial judge refused to allow the proffer. (S69/1223-24). During Pasha's own testimony, the prosecutor subtly ridiculed Pasha's objection to the exhibit. (S76/2258).

**(f) Refusing Proffers**

The trial court repeatedly refused Pasha's requests to proffer witnesses' answers to questions that were disallowed. (S69/1224;S70/1444;S70/1450;S71/1565-66;S72/1673-74,1688,1691;S73/1800;S75/2091,2116-17,2129,2208). Refusing to allow a proffer is reversible error because it deprives a party of the right to make a record to establish error for appellate purposes. "Ordinarily, where the court refuses to allow a proffer, it prevents a determination of the propriety of the trial court's ruling by the reviewing court and is prejudicial to the party making the proffer and generally is reversible error." Thunderbird Drive-In Theatre, Inc. v. Reed By & Through Reed, 571 So. 2d 1341, 1345 (Fla. 4th DCA 1990); see also Finney v. State, 660 So. 2d 674, 684 (Fla. 1995) ("Without a proffer it is impossible for the appellate court to determine whether the trial

court's ruling was erroneous and if erroneous what effect the error may have had on the result."). The trial court's repeated refusal to allow Pasha to proffer testimony for the appellate record was error that requires reversal for a new trial.

**ISSUE IX: THE PROSECUTOR EXCEEDED THE BOUNDS OF PROPER ADVOCACY AND RENDERED THE TRIAL FUNDAMENTALLY UNFAIR BY VIOLATING PASHA'S RIGHT TO POST-MIRANDA SILENCE, ASSERTING PERSONAL KNOWLEDGE AS TO PASHA'S GUILT, AND DENIGRATING THE JURY'S ROLE IN THE SENTENCING PROCESS.**

**a. Comments on Post-Miranda Silence.**

During his cross-examination of Pasha, the prosecutor violated Pasha's right to silence and right to due process when he repeatedly asserted that Pasha had a duty to tell the officers who stopped him that his wife and stepdaughter were murdered. The prosecutor specifically questioned Pasha about his not telling the African-American deputy who arrived at the scene. The prosecutor asked Pasha if it was his guilty conscience that kept him from telling the police officers "what you just did to Robin Canady and Raneesha." (S76/2258).

The prosecutor was well-aware that Pasha was read Miranda warnings by Deputy Mason, one of the first officers he encountered at the traffic stop. One of the primary pretrial issues was the sufficiency of the Miranda warnings given by Deputy Mason to

Pasha. (S29/526-27,530).<sup>18</sup> The prosecution litigated the sufficiency of the Miranda warnings before the first trial and again, twice, after the remand. The prosecutor was therefore very familiar with the testimony of Deputy Mason who was the first officer to interview Pasha at the traffic stop. (E.g., S30/558 where Attorney Harb remarks, "I believe Kevin Mason testified that he read Miranda to Mr. Pasha."). Mason testified during the suppression hearings that he gave Pasha Miranda warnings soon after he was removed from the van. Mason said that Pasha was in custody at the point when he read Pasha the Miranda warnings. (23/403; see also SC08/30/514). Other officers arrived later, including the African-American deputy.

During trial, the prosecutor commented repeatedly on Pasha's post-Miranda silence, committing a violation of one of the most basic rules of a fair trial, that any comment that is fairly susceptible of being a comment on silence taints the fairness of the trial. These excerpts from the cross-examination show that the prosecutor leveled a barrage of criticism at Pasha for not

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<sup>18</sup> Before the first trial, the court had granted Pasha's 2007 motion to suppress statements based on a Miranda violation. After remand, the State moved for reconsideration of that suppression order. In April 2012, Judge Fuente reheard Pasha's original motion to suppress statements (S30/557-562) but he recused himself before he ruled on the motion (S31,S24). When Judge Fernandez took the case on, she reheard the motion in its entirety. (25/438).

telling the officers who stopped him, and in particular the African-American officer who arrived later, what, according to the prosecutor, Pasha had done to the victims:

Q. All right. And here comes the police, Mr. Pasha. Two police officers approach you. Did you volunteer the information -- with red lights, right? They turned the lights on and parked behind you?

A. Yes.

Q. Did you tell them, folks, don't waste your time; please go check on my wife and my stepdaughter? Did you tell them that, Mr. Pasha?

A. No, I didn't. [S76/2251]

\* \* \* \*

Q. In Florida, when somebody is bleeding and seen by someone else, someone else is supposed to call the police. Humanity. [S76/2252]

\* \* \* \*

Q. . . . [A]re you telling this jury that if you come upon your wife, who is dead, and your stepdaughter who goes (gasp) and then you realize she's dead, you do not tell the police? Is that how you think things are to be done?

\* \* \* \*

Q. No, my question to you, sir, are you telling this jury that in the State of Indiana [where Pasha was from], a citizen, let alone a husband and step-dad, coming up on a scene like that, trained, raised, brought up to not report a matter like that to the police? Is that what you are telling this jury? [S76/2252-53]

\* \* \* \*

Q. My question to you, Mr. Pasha, you did not tell

the first two deputies about Robin and Raneesha?

A. That's definitely so. That's something I definitely wouldn't have done.

\* \* \* \*

Q. More officers arrived at the scene of the traffic stop, correct?

A. Yes.

\* \* \* \*

Q. Did you tell any of them?

A. I didn't tell anybody.

Q. Is it because they all were white, or any of them were not white?

A. It was one -- it was one -- there was one officer that wasn't white, and he's the one I give my driver's license to.

Q. He was African American?

A. Yes, I think his name was Rembrandt or something to that effect. I gave my driver's license to him for identification purposes, but other than that, I didn't say it to anybody else.

Q. Did you tell the African American that day about Robin and Raneesha? [S76/2255-56]

\* \* \* \*

Q. Mr. Pasha, you're the one on trial here.

A. Yes.

Q. I'm asking you to explain to this jury why you did not tell -- we understand. You said you didn't trust the white officers because you came from Gary, Indiana. Now, here's an African American deputy at the scene and you didn't tell him because it was -- I said private. What would you call it?

Personal matter? [S76/2257]

\* \* \* \*

Q. Isn't it true, Mr. Pasha, that had you reported that, that would be helping the police and the police would be arresting you sooner than that, right?

A. I don't know. I have no idea what would happen. I don't know.

Q. Isn't it true, Mr. Pasha, that was the guilty conscience in you, sir, not to tell the police what you just did to Robin Canady and Raneesha Singleton? [S76/2258]

These comments on Pasha's post-Miranda silence were clearly prohibited under Doyle v. Ohio, 426 U.S. 610 (1976); State v. Smith, 573 So. 2d 306, 316-18 (Fla. 1990); State v. Hoggins, 718 So. 2d 761 (Fla. 1998); Art. 1, § 9, Fla. Const.; U.S. Const., Amends. 5, 14.

**b. Assertions of Personal Knowledge of Pasha's Guilt**

"[B]ecause a jury can be expected to attach considerable significance to a prosecutor's expressions of personal beliefs, it is inappropriate for a prosecutor to express his or her personal belief about any matter in issue." Pacifico v. State, 642 So. 2d 1178, 1184 (Fla. 1<sup>st</sup> DCA 1994). When cross-examining Pasha and arguing in closing, the prosecutor made assertions that expressed his personal belief in and knowledge of Pasha's guilt, which is clearly improper. See Gore v. State, 719 So. 2d 1197, 1201 (Fla. 1998).

During cross, after asking about the tire thumper, the prosecutor stated: "I'll tell you what you were going to do; you were trying to get rid of it." (S76/2262). When Pasha was explaining how he got to Robin's car, the prosecutor said, "Okay. It's your story. Go ahead." (S76/2269). Then, without provocation, the prosecutor stated, "You know the question, Mr. Pasha. You killed these two ladies. The question is why. Could you answer that question?" (S76/2272). The prosecutor continued to assert his knowledge that Pasha was guilty, stating: "Mr. Pasha, we're talking about the homicides of Robin Canady and Raneesha Singleton, not about how hard you work. They died. You are to talk about how they died, Mr. Pasha." (S76/2273). "No, let's talk about their death." (Id.) "Mr. Pasha, you're on trial for two counts of first-degree murder for killing, for killing the two victims." (Id.). When Pasha responded that he would never do a thing like that, the prosecutor told him, "Mr. Pasha, you need to quit." (Id.). The prosecutor continued to insinuate his personal knowledge of Pasha's guilty when the following exchange occurred:

Q. [by prosecutor]: Your story is incomplete, Mr. Pasha.

A. What's incomplete?

Q. Why did you kill Robin Canady?

A. Excuse me?

Q. Why did you kill Robin Canady?

(S76/2277). In closing argument, the prosecutor said: "And what it comes down to is this: They see the man that we know murdered Robin Canady and Raneesha Singleton walking through that complex . . . ." (S76/2294).

**c. Minimizing Jurors Sense of Responsibility for Sentencing**

During his penalty phase closing argument, in response to the defense attorney's argument, the prosecutor minimized the jurors' role in the penalty decisional process. He told the jurors:

Question[,] it was a good question by the defense. What good comes from killing this man? You're not being asked to kill anyone. You're being asked to follow the law and render a recommendation to Her Honor. You won't be killing anyone. You're not qualified and that's not your job title. You are the finders of fact. You are jurors. Let's put that in perspective.

(51/3334-35). This argument is remarkably similar to the argument made by the prosecutor in Caldwell v. Mississippi, 472 U.S. 320 (1985). In Caldwell, the prosecutor shifted the responsibility to the reviewing court, whereas here, the prosecutor shifted it to the trial judge. Nevertheless, the prejudicial effect is the same as that laid out in Caldwell. "The argument here urged the jurors to view themselves as taking only a preliminary step toward the actual determination of the appropriateness of death—a determination which would eventually be made by others and for which the jury was not responsible." 472 U.S. at 336. This

particular error requires reversal for new penalty proceedings.

**ISSUE X: THE TRIAL COURT ERRED BY INSTRUCTING AND RELYING ON CCP TO JUSTIFY THE DEATH SENTENCES BECAUSE THAT AGGRAVATING FACTOR WAS BARRED BY DOUBLE JEOPARDY.**

In the sentencing order of May 2008, Judge Fuente made a factual finding that the State presented insufficient evidence of the cold, calculated, and premeditated (CCP) aggravating factor: "the Court finds that the required element of heightened premeditation of this aggravating circumstance is not established beyond a reasonable doubt." (S48/2147).

Thereafter, the State could not use CCP to support the death sentence in the second trial because the finding of Judge Fuente constitutes an acquittal of that element of the death penalty statute. The constitutional proscription against double jeopardy was violated when, in the second prosecution, Judge Fernandez instructed the jury on CCP and then independently found and gave it significant weight to support the death sentence.

The U.S. Supreme Court defines "an acquittal to encompass any ruling that the prosecution's proof is insufficient to establish criminal liability for an offense." Evans v. Michigan, 133 S.Ct. 1069, 1074-75 (2013). "Thus an 'acquittal' includes 'a ruling by the court that the evidence is insufficient to convict,' a 'factual finding [that] necessarily establish[es] the criminal defendant's lack of criminal culpability,' and any other 'rulin[g]

which relate[s] to the ultimate question of guilt or innocence.'" Evans, 133 S. Ct. at 1075 (quoting United States v. Scott, 437 U.S. 82, 91, 98, and n. 11 (1978)). In Evans, the Court drew upon its analysis in Arizona v. Rumsey, 467 U.S. 203 (1984), to conclude that jeopardy attaches even when the acquittal is due to an erroneous ruling of the judge. Evans, 133 S. Ct. at 1076.

An acquittal at a trial-like sentencing phase of a death penalty case raises a double jeopardy bar. Sattazahn v. Pennsylvania, 537 U.S. 101, 106-07 (2003). "[T]he touchstone for double-jeopardy protection in capital-sentencing proceedings is whether there has been an 'acquittal.'" Id. at 109. In Sattazahn, a hung jury on the sentence was not an acquittal because the judge who imposed the life sentence made no findings and resolved no factual matter. Id. at 109-10. The Supreme Court explained that capital sentencing has evolved relating to double jeopardy:

When Bullington [v. Missouri, 451 U.S. 430(1981)], Rumsey, and Poland [v. Arizona, 476 U.S. 147, 156 (1986)] were decided, capital-sentencing proceedings were understood to be just that: *sentencing proceedings*. . . . Thus, in its search for a rationale to support Bullington and its "progeny," the Court continually tripped over the text of the Double Jeopardy Clause.

Recent developments, however, have illuminated this part of our jurisprudence. Our decision in Apprendi v. New Jersey, 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000), clarified what constitutes an "element" of an offense for purposes of the Sixth Amendment's jury-trial guarantee. Put simply, if the existence of any fact (other than a prior conviction) increases the maximum

punishment that may be imposed on a defendant, that fact-no matter how the State labels it-constitutes an element, and must be found by a jury beyond a reasonable doubt. Id., at 482-484, 490, 120 S.Ct. 2348.

Sattazahn, 537 U.S. at 110-11. The court in Sattazahn explained that the post-Ring double jeopardy analysis focuses on the whether a factfinder made findings that constitute an acquittal of aggravating circumstances.

In the post-Ring world, the Double Jeopardy Clause can, and must, apply to some capital-sentencing proceedings consistent with the text of the Fifth Amendment. If a jury unanimously concludes that a State has failed to meet its burden of proving the existence of one or more aggravating circumstances, double-jeopardy protections attach to that "acquittal" on the offense of "murder plus aggravating circumstance(s)." Thus, Rumsey was correct to focus on whether a factfinder had made findings that constituted an "acquittal" of the aggravating circumstances; but the reason that issue was central is not that a capital-sentencing proceeding is "comparable to a trial," 467 U.S., at 209, 104 S.Ct. 2305 (citing Bullington, supra, at 438, 101 S.Ct. 1852), but rather that "murder plus one or more aggravating circumstances" is a separate offense from "murder" *simpliciter*.

Sattazahn, 537 U.S. 101, 112.

When Judge Fuente made the factual finding that CCP was not established beyond a reasonable doubt at the first trial, he acquitted Pasha of that aggravating factor, for the purpose of death eligibility and sentencing. Florida's aggravating factors function as elements of the death sentencing statute. See Ring v. Arizona, 536 U.S. 584, 609 (2002) ("Because Arizona's enumerated

aggravating factors operate as 'the functional equivalent of an element of a greater offense,' the Sixth Amendment requires that they be found by a jury.") (quoting Apprendi v. New Jersey, 530 U.S. 466, 494, n. 19 (2000)). The State could not use CCP as an aggravating factor in the second trial because Pasha was acquitted of the aggravating factor by Judge Fuente. Rumsey, Evans, Ring and Sattazahn. Consequently, it violated the Fifth Amendment's Double Jeopardy Clause when Judge Fernandez instructed the jury on CCP and then independently found that it existed and afforded it significant weight in her 2013 sentencing order (11/2006-07). The double jeopardy violation with regard to an aggravating circumstance also renders the death sentence unconstitutional under the Eighth Amendment.

**ISSUE XI: THE TRIAL COURT ERRED IN GIVING FUNDAMENTALLY ERRONEOUS INSTRUCTIONS ON TWO AGGRAVATING CIRCUMSTANCES.**

The trial court committed fundamental error with regard to instructing the jury on two aggravating circumstances. The first instance involves the standard instruction for the aggravator that the capital felony was committed by a person previously convicted of another capital felony or of a felony involving the use or threat of violence to a person. § 921.141, Fla. Stat. The standard instruction recognizes that the character of a crime is a matter of law, therefore, it contains a note to judge, as follows:

*Because the character of a crime if involving violence or threat of violence is a matter of law, when the State offers evidence under aggravating circumstance "2" the court shall instruct the jury of the following, as applicable:*

*Give 2a or 2b as applicable.*

a. The crime of (previous crime) is a capital felony.

b. The crime of (previous crime) is a felony involving the [use] [threat] of violence to another person.

Fla. Stand. Crim. Jury Inst. 7.11 Instead of inserting a generic "previous crime," the judge inserted specific details of the allegations made by the State and referred to those allegations as legally established facts. The court instructed the jury:

Aggravating circumstances must be proven beyond a reasonable doubt. Those you may consider are limited to any of the following:

1. The defendant was previously convicted of a felony involving the use or the threat of violence to the person.

Each of your verdicts finding the defendant guilty of first degree premeditated murder on Count 1 and Count 2 of the indictment is a previous conviction of another felony involving the use or threat of violence to the person.

The robbery involving Maxine Schwartz (committed on March 27th, 1984) is a felony involving the use or threat of violence to the person.

(52/3369).

The trial court similarly erred when instructing as to the fourth aggravating circumstance: the capital felony was committed by a person previously convicted of a felony and on parole. The judge instructed the jury:

4. The crime for which Khalid Pasha is to be sentenced was committed after he had been previously convicted of a felony and was on parole.

Khalid Pasha was convicted of a bank robbery in 1970 and was on parole for said offense on August 23rd, 2002.

(52/3371).

The instructions do not allow the jury to decide whether the State proved the facts underlying the aggravating factors. Instead, they refer to the specific allegations against Pasha as legally established facts. The instructions dictate as law what is actually only evidence that the jury was free to disregard. The instructions invaded the province of the jury to consider and accept or reject the facts upon which the aggravating circumstances rested.

The error here is similar to the error in Wright v. State, 586 So. 2d 1024, 1030-31 (Fla. 1991), where a trial court's standard instruction "invaded the fact-finding province of the jury." In Wright, the instruction as to battery on a law enforcement officer told the jury that "Peggy Gahn and Gary Farless, the respective victims, were law enforcement officers," instead of what the standard instruction directed, which was: "The court now instructs you that (name official position of victim designated in charge) is a [law enforcement officer]." (Emphasis added). The instruction given "directed the jury to find as a

matter of law that an essential element was proved" because "[w]hether these particular persons were law enforcement officers at the time the offense occurred was a matter of fact, and that fact constituted an essential element of the offense."

The standard instruction for battery on a law enforcement officer "requires courts to advise jurors that the *official position* of the alleged victim-not the actual person alleged to be the victim-is a law enforcement officer." This Court explained that "[a] proper application of the standard instruction, for example, would advise the jury as a matter of law that the position of deputy sheriff is a law enforcement officer within the meaning of the offense charged. That would leave for the jury the factual determination of whether the person alleged to be the victim was a deputy sheriff, and therefore, a law enforcement officer."

The same type of fundamental instructional error made in Wright was made by the trial judge in this case with regard to the two aggravating circumstances. The trial court invaded the province of the jury and deprived Pasha of his right to a jury determination of the facts. This was a Due Process and Sixth Amendment violation that deprived Pasha of his right to a trial by jury with respect to aggravating circumstances needed for the death sentence. The error renders the death sentence

unconstitutional under Ring v. Arizona, 536 U.S. 584 (2002), and the Fifth, Sixth, Eighth and Fourteenth Amendments of the U.S. Constitution, and requires reversal and remand for a new penalty proceeding.

**ISSUE XII: IN DECIDING WHETHER TO IMPOSE A DEATH SENTENCE, THE TRIAL COURT IMPROPERLY UTILIZED THE TEDDER STANDARD, WHICH APPLIES ONLY TO JURY LIFE RECOMMENDATIONS.**

Over the course of the two trials, six jurors have voted to recommend a life sentence. In this case, the vote was 11-1 for death, but in the first trial, the vote was 7-5 for death. The trial judge could reasonably have chosen to impose a sentence of life imprisonment notwithstanding the jury's death recommendation if she had understood the proper legal standard for doing so.

Judge Fernandez wrote in the sentencing order:

It is well settled that a jury's advisory opinion is entitled to great weight reflecting as it does, the conscience of the community, and should not be overturned unless no reasonable basis exists for the opinion. See *Richardson v. State*, 437 So. 3d 1091 (Fla. 1983).

(11/2014) (emphasis added). This passage reflects that the judge misunderstood her responsibility under the law. This Court's Richardson decision, cited by Judge Fernandez, refers to the Tedder standard, which is to be used only in determining whether a trial judge may impose a death sentence notwithstanding a jury's recommendation of life imprisonment. See Tedder v. State, 322 So.

2d 908 (Fla. 1975). "The singular focus of a Tedder inquiry is whether there is 'a reasonable basis in the record to support the jury's recommendation of life,' rather than the weighing process which a judge conducts after a death recommendation." Keen v. State, 775 So. 2d 263, 283 (Fla. 2000); see also Robinson v. State, 95 So. 3d 171, 183 (Fla. 2012) ("[T]he weighing process which a trial court conducts after a death recommendation is different from the review conducted after a life recommendation."); Washington v. State, 907 So. 2d 512, 513-14 (Fla. 2005). An entirely different standard applies when the jury recommends death. See § 921.141(3) ("Notwithstanding the recommendation of a majority of the jury, the court, after weighing the aggravating and mitigating circumstances, shall enter a sentence of life imprisonment or death . . ."). This Court has cautioned that the two standards should not be intermixed. See Washington, 907 So. 2d at 513; Keen, 775 So. 2d at 283; see also Aguirre-Jarquín v. State, 9 So. 3d 593, 611 (Fla. 2009) (Pariente, J., concurring) ("'[G]reat weight' does not preclude the trial judge from disagreeing with a death recommendation and imposing a life sentence.") (quoting Judge O.H. Eaton, Jr.).

The trial judge's error in using the wrong legal standard cannot be dismissed as harmless. State v. DiGuilio, 491 So.2d 1129 (Fla. 1986). The trial judge's misunderstanding of the

applicable legal standard may well have interfered with her ability to exercise independent, reasoned judgment as to whether the totality of the factual circumstances showed that justice could be satisfied by a sentence of life imprisonment. This Court should reverse for resentencing.

**ISSUE XIII: THE FLORIDA DEATH PENALTY STATUTE, ON ITS FACE AND AS APPLIED, VIOLATES RING V. ARIZONA.**

The U.S. Supreme Court in Ring v. Arizona, 536 U.S. 584 (2002), declared unconstitutional a capital sentencing scheme in which the judge, rather than a jury, was responsible for (1) the factfinding of an aggravating circumstance necessary for imposition of the death penalty, as well as (2) the ultimate decision whether to impose a death sentence. During this trial, it was recognized by the judge and the prosecutor that Florida is a "judge sentencing" state. Both the judge and prosecutor impressed upon the jury that the judge was solely responsible for deciding the sentence. (e.g. 51/3335; 52/3365; S63/352). If the trial judge and the prosecutor were correct to so instruct the jury, then the capital sentencing scheme violates the Sixth Amendment within the meaning and constitutional analysis of Ring.

Florida's procedure "emphasizes the role of the circuit judge over the trial jury in the decision to impose a sentence of death." Troy v. State, 948 So. 2d 635,648 (Fla. 2006). The trial

judge has the principal responsibility for determining whether a death sentence should be imposed and is not limited to only the material put before the jury. Troy, 948 So. 2d at 648; Williams v. State, 967 So. 2d 735,751 (Fla. 2007). The jury's advisory role, coupled with the lack of a unanimity requirement for either the finding of aggravating factors or for a death recommendation, is insufficient to comply with the minimum Sixth Amendment requirements of Ring.

The jury split 11-1 in its decision to recommend death, and the trial judge had no way of knowing which aggravating factors the jurors found, or by what vote. A juror may consider a particular aggravating circumstance proved beyond a reasonable doubt and hence weigh it in his or her death recommendation, and another juror may not consider it established and not weigh it in his or her death recommendation. The judge told the jurors at the outset that different jurors would give different weight to different aggravating factors (S63/355-56). Such a determination of aggravating factors is incompatible with the Sixth Amendment. The constitutional deficiency is not cured by the fact that the judge independently makes the findings of aggravating circumstances and imposes sentence. The capital sentencing scheme and the death sentences imposed are constitutionally invalid; the sentences should be reduced to life in prison.

CONCLUSION

Khalid A. Pasha respectfully requests this Court to reverse the convictions and death sentences.

CERTIFICATE OF SERVICE

I certify that a copy has been e-mailed to Blair Dickert at cappapp@myfloridalegal.com and blair.dickert@myfloridalegal.com on this 9th day of January, 2015.

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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