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IN THE SUPREME COURT OF FLORIDA

CASE NO. SC10-2170

TAVARES DAVID CALLOWAY,

Appellant/Cross-Appellee,

vs.

THE STATE OF FLORIDA,

Appellee/Cross-Appellant.

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

INITIAL BRIEF OF APPELLANT

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INTRODUCTION

In the trial court, the Appellant, Tavares Calloway, was the defendant and the Appellee, the State of Florida, was the prosecution. In this brief, the parties will be referred to as they stood in the lower court. The symbols "R," "SR," and "T" will be used to refer to portions of the record on appeal, supplemental record and trial transcript, respectively. All emphasis is supplied unless the contrary is indicated.

STATEMENT OF THE CASE AND FACTS

On May 26, 1998, an indictment was filed charging the defendant with five counts of first degree murder in the shooting deaths of Frederick McGuire, Trenton Thomas, Derwin Copeland, Gary St. Charles, and Adolphus Melvin, armed robbery, armed kidnapping and armed burglary. (R. 94-100).

A jury trial in this cause began on April 27, 2009, before the Honorable Dava J. Tunis, Circuit Judge. (R. 5684-86).

Latonya Taylor testified that in 1997, she lived with Adolphus Melvin, who went by the nickname of "Tank." (T. 5574-76). On January 21, 1997, after she was unsuccessful in reaching Melvin, Taylor went to St. Charles' apartment. Taylor heard loud music emanating from the dark apartment. After her knock at the door went unanswered, Taylor pushed the door open and saw several bodies on the floor. Taylor called the police. After the police arrived, Taylor saw Melvin on

the floor of the apartment. He was bound by duct tape and had been shot in the head.[1] (T. 5583-88).

Commander Ethel Jones arrived on the scene at 7:25 PM, at 580 NW 64 Street, Apartment 8. (T. 5610-13). Jones observed five men, bound by duct tape, shot in the head. (T. 5916-18). McGuire was transported to the hospital after Jones heard audible sounds from him. (T. 5616, 5626). Jones also observed packets used in drug distribution strewn all over the apartment. (T. 5639-43). Finally, although Jones was informed that a child was in an apartment down the hall, Jones never saw or talked to the child. (T. 5627).

Fabrice Nelson worked the crime scene for nearly 20 hours under the direction of the lead detective, Alberto Borges. (T. 5703-06). Nelson testified that Apartment 8 was in the middle of the second floor and could be reached by stairwells on the north and south sides of the building. (T. 5710, 5717). The building faced I-95; noise from the highway was clearly audible in the apartment. (T. 5713).

Nelson noted that the apartment stereo was on when he arrived and that someone had rummaged through the apartment closets. (T. 5735, 5739). The apartment had a solid wood door and a glass top dining table. (T. 5736-37).

[1] Taylor said that Melvin generally wore a gold chain. (T. 5579). Taylor noted that after 1/21/97, she never saw Melvin's chain again. (T. 5580, 5589).

Nelson found five spent, .45caliber casings on the floor, bullet fragments under the bodies, and a large number of envelopes used for drug distribution. (T. 5744, 5813-17). Nelson found no cash, wallets or jewelry, other than a single gold medallion under Melvin's body. (T. 5741-42, 5810-11). With the exception of two baggies of marijuana in Melvin's shirt pocket, no money or drugs were found in the victims' clothing. (T. 5796-5808).

In the bedroom, Nelson found notebooks containing calculations for collections, stamps for drug packaging envelopes and a triple beam scale. (T. 5788-93). Despite the outward signs of a drug operation, Nelson found just a small amount of marijuana in the apartment. (T. 5742).

Nelson lifted a large number of fingerprints from the apartment, including the refrigerator, the bedroom wall and the duct tape used to bind the victims.[2] (T. 5878-5886, 5924). Nelson did not recall processing the recovered spent casings for fingerprints. (T. 5984). Finally, Nelson did not collect any items for DNA testing. (T. 5740).

Sergeant George Law testified that he was not originally involved in the investigation of this case. (T. 6049). Prior to May, 1998, Law was only aware that

[2] All of the duct tape was commingled in one plastic bag. (T. 5888, 5994).

five people had been tied up and shot. (T. 6050). Law had been working on the Gosha murder case and had received information that the defendant was a witness.

On May 13, 1998, Law heard that the defendant had been brought to the station by Detective Kelvin Knowles. (T. 6060-61). The defendant's nickname was "Black." (T. 6059). Law, accompanied by Borges, spoke with the defendant, who was seated in a 10 ft. x 15 ft. room equipped with a 2-way mirror. (T. 6066-68).

According to Law, the defendant identified himself as a born-again Christian. The defendant was 19 years old, although, to Law, he appeared to be older. (T. 6077, 6080). Law told the defendant that was brought in on a traffic warrant. Law wanted to speak with the defendant about a case he was handling; Borges wanted to speak to the defendant about five people killed near I-95. (T. 6079). Law explained the Miranda rights and the defendant signed a rights waiver form at 3:31 PM. (T. 6082-83). Law said that the defendant was not threatened or promised anything and that the defendant never asked for a lawyer or indicated that he did not want to talk. (T. 6085-87). Law first questioned the defendant about the Gosha case, followed by Borges questioning the defendant about this case. In response to Borges' questions, the defendant told Borges that he did not know what Borges was talking about, ending several times with the admonition, "find the facts." (T. 6089-92). At 5:00 PM, Borges and Law left the room. (T. 6093).

Law returned at 1:00 AM, when Miami-Dade Detective George Pereira spoke with the defendant. (T. 6096-97).

At 8:00 AM, Law woke the defendant up. The defendant asked Law if he could make a call. (T. 6102-03). While the defendant was speaking with Diane Odom, Law noticed that the defendant's posture changed. He appeared emotional, although he was not crying. (T. 6106). When the defendant completed his call, Law took him back to the interrogation room, where he was joined minutes later by Detective Willie Everett. (T. 6107-09). After Law told the defendant that he could see that the defendant was in love with Odom, Everett told the defendant that the police had his fingerprints on the apartment door and on the duct tape used in the murders. Everett admonished the defendant that if he was a good Christian, he should "get it out." (T. 6110). The defendant started to cry. (T. 6110). While the defendant was eating breakfast, Everett told the defendant that the police knew that he wore camouflage clothes and dark sunglasses while committing the murders. (T. 6111). Between 9:00-9:15 AM, the defendant said that it wasn't supposed to go down that way. It was just supposed to be a robbery, but it got out of hand. The defendant then began to make a statement to the officers. (T. 6112).

The defendant said that three days prior to the murders, he went to the Liberty Market to buy camouflage clothes and sunglasses. Gosha had come to the defendant's house and told the defendant that they had a "lick," street slang for a

robbery. (T. 6112-13). The defendant claimed that he and "Tote" went to Frank's house and then to St. Charles' apartment. The defendant, armed with a .45 caliber gun, accosted St. Charles at his car. The defendant put St. Charles in a choke hold and took him upstairs. (T. 6113). In St. Charles' apartment, the defendant found "Tank" and several others eating. The defendant ordered them on the floor and had them take off their clothes and jewelry. When Tote could not find anything with which to tie the men up, the defendant had Tote go to the store. Tote returned with duct tape. When Tote ran out of tape, the defendant had Tote return to the store for more. The defendant then had Tote go to Frank's house to get instructions. Frank initially said that they should kill two of the men. When the defendant expressed concerns that a few of the men knew him, Frank told the defendant to kill them all. The defendant said that he then increased the stereo volume and shot each man in the head. The defendant stated that he and Tote took marijuana, jewelry, beepers, cell phones and cash. (T. 6113-16). The defendant left the apartment, and a few days later, disposed of the gun on a street in Liberty City. (T. 6119). The defendant said that he gave the jewelry to "Adolphus" to be pawned. (T. 6119).

Law testified that the defendant's statement, a pre-interview, was not recorded. (T. 6121). Later, the defendant gave a 30-minute, stenographically recorded statement. (T. 6120, 6125).

At the defendant's request, Law arranged to have Odom brought to the station.

After her arrival, Odom spent some time alone with the defendant. (T. 6125-27). Law and Everett then took the defendant and Odom in a van to the location where the defendant claimed that he disposed of the gun. (T. 6127-36). In the van and on the streets, the defendant was not handcuffed. (T. 6512-22). They were unable to find the firearm. (T. 6135-36). Law and Everett then took the defendant to see his relatives and to get something to eat. (T. 6137-43). When they returned to the station, the defendant reviewed the transcribed statement, made corrections and signed the statement. (T. 6145-52).

The transcribed statement was similar in content to the defendant's pre-interview statement, but added details, including: the idea to hit "Tank" was Frank's, "Tote" was identified as Antonio Clark, two pounds of marijuana were taken from the apartment, expended shell casings were left behind on the floor, the defendant wiped the apartment free of fingerprints before leaving, the defendant was in St. Charles' apartment for three hours, it was dark when he left, the defendant was driven by Antwan Davis from the scene, and after the murders, the defendant burned his clothes and had Gosha take the stolen jewelry to Gosha's uncle, Marcus. (T. 6160, 6163, 6166-70, 6171, 6180-81). The defendant added that Marcus was now in federal prison. (T. 6180-81).

Although aware that five people had been shot, Law claimed he was unaware of several other details until the defendant confessed, including: duct tape was used

to bind the victims, the victims were in their underwear, the radio was on, the apartment was ransacked, marijuana and jewelry were taken, the caliber of the gun, the number of wounds sustained by each victim, and the positions of the victims. (T. 6230-6240, 6587-88, 6607). Law denied feeding information to the defendant for use in the confession. (T. 6241).

On cross examination, Law recalled that there were newspaper articles about the shootings. (T. 6260). Although a regular reader of the paper, Law did not specifically recall the articles about this case or that many of the specific details about the crime had appeared in the newspaper. (T. 6258-60, 6261-65, 6271-75).

Law stated that the defendant had been in the interview room for about 18 hours before confessing. (T. 6268). Law did not keep track of the detectives who spoke with the defendant during that period. (T. 6304-05). Law said that although recording equipment was available for his use, he chose not to record the questioning of the defendant.[3] (T. 6358-60). Law was alone with the defendant for about 10-15 minutes before he was joined in the room by Detective Everett. (T. 6542).

As for Everett's involvement in the confession, Law conceded that Everett lied to the defendant about his prints being found at the scene.[4] (T. 6373-76). In

[3] Approximately five years after the defendant's statement, the City of Miami Police Department mandated that all interviews with suspects be recorded. (T. 6361).

[4] Law testified that he had been trained in interrogation at the Reid School.

fact, there were no fingerprints belonging to the defendant found at the scene. (T. 6376). After the interrogation, Law became aware that Detective Eunice Cooper had slipped a note under the door for their use during questioning. (T. 6377-78). Many of the facts from the note found their way into the defendant's confession. (T. 6378-84).

Law said that Cooper never told him that there had been an eyewitness in the case or that the witness had seen a man wearing a brown coat leaving the crime scene. (T. 6388-90).

Anthony Strachan testified that on January 21, 1997, he was living with his mother, Val Williams, in Apartment 6, two doors down from St. Charles. St. Charles was known to Strachan as "Shorty." (T. 6644-56).

That afternoon, from his kitchen window, Strachan saw Shorty with a black man on the street, who was dressed in a coat and wore a cap pulled down over his forehead. Strachan described the coat as a worn, heavy, old-school, brown or tan military field jacket, that was lacking a military print. (T. 6689-93, 6740-41). The man looked older than Strachan, but no older than 30-35 years of age.[5] (T. 6703,

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Law learned that it was permissible to lie to a suspect during questioning. (T. 6392-96).

[5] In April, 2008, Strachan was shown a photo lineup containing the defendant's photograph. (T. 6699-6700, 6785, 6791). Strachan could not identify the defendant as the man he had seen walking with Shorty or who had walked past

6837). Strachan had never seen the man before. A third black male was also standing nearby. (T. 6657-59). Strachan then saw Shorty and the second black male come up the stairs and walk past his apartment. (T. 6663-65). Strachan did not see a gun at Shorty's head and did not see the men enter Apartment 8. (T. 6689, 6745-46). Less than 2 hours later, Strachan heard several loud "boom" noises that seemed to come from stereo speakers. (T. 6672-73, 6685). Strachan then saw a man walk past his apartment. The man was carrying a cigar box or shoe box that he had previously seen in Shorty's possession. (T. 6702). Strachan nodded at the man and then closed his apartment door. (T. 6677-78). It was still daylight. (T. 6693).

After dark, Strachan heard a police radio. At the request of his mother, Strachan did not speak to the police. (T. 6695-96). After telling his mother what he had seen, Strachan and his family moved out of their apartment that night. (T. 6759, 6780-81)

Strachan served in the Marines after the incident. Given that experience, he thought that the "boom" sounds may have been gunfire. (T. 6720). Strachan heard less than 10 "boom" sounds, one to two seconds apart. (T. 6719).

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his apartment after hearing the noises from Apartment 8. (T. 6786, 6791).

Adolphus Thornton[6] knew the defendant as "Black" and was aware that the defendant was a friend of his nephew, Michael Gosha. (T. 6884). During the first week in January, 1997,[7] the defendant gave him a gold bracelet to pawn. (T. 6885, 6887). The next day, the defendant accompanied Thornton to Miami Gold, where he pawned the bracelet for $180. (T. 6889). Three days later, Thornton heard that "Tank," a drug dealer, had been killed. (T. 6890, 6903). Thornton thought that he had previously seen Tank wearing the pawned bracelet. (T. 6891). The next day, Thornton retrieved the bracelet from the pawn shop. (T. 6904-05).

Miami-Dade Lt. George Pereira was working in the robbery bureau on May 13, 1998, when he was asked to go to the Miami Police Department after midnight to interview the defendant. (T. 6973-80). Pereira talked to the defendant for twenty minutes. The conversation was not recorded at the defendant's request. (T. 6981).

Lt. Alberto Borges testified that he was assigned as the lead detective in this

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[6] Thornton admitted that he was convicted in 1997 for making a false, fictitious fraud claim to the IRS, for which he served time in federal prison. He also had a 2004 grand theft conviction. (T. 6893, 6914-15).

[7] Thornton's recollection was that the defendant approached him days before the murders. Thornton recalled reading about the murders in the paper. (T. 6887-88).

case on January 21, 1997.[8] (T. 7096-97). Borges arrived at the scene at 8:10 PM. (T. 7099-7100). There was no sign of forced entry into the apartment. (T. 7135). Although the apartment was thoroughly processed for fingerprints, none were found that matched the defendant. (T. 7578). Prints belonging to Antonio Clark, aka "Tote," were found in the apartment and on duct tape. (T. 7137-39, 7349). Although the victims' pants pockets were not tested, cigarette butts were tested for DNA. (T. 7149, 7583-84). No physical evidence was developed that tied the defendant to the scene in any way. (T. 7586). Additionally, the weapon used in the shootings was never found. (T. 7146). Borges said that all of the victims, save Copeland, were involved in the drug operation at the apartment. (T. 7111-13).

Borges had officers conduct an area canvass, but found no one who had heard shots fired. (T. 7123-24). Two days later, Borges spoke with Val Williams, the tenant in Apartment 6, but Williams provided no information. (T. 7148-49).

On May 11, 1998, Borges received some information that caused him to bring the defendant in for questioning. (T. 7156). The defendant was brought to the station at 3:00 PM on May 13, 1998. (T. 7157-58). Shortly thereafter, Borges and Law entered an interview room to speak with the defendant. (T. 7159, 7167).

[8] Detectives Everett, Cooper and Law were not initially involved in the investigation of this case. (T. 7145).

Borges initially accused the defendant of committing the homicides. (T. 7617-18). The defendant denied involvement and told Borges, "I don't know what you are talking about." (T. 7170, 7621-23). Borges showed the defendant photographs of the bodies of Melvin and St. Charles. Borges said that the defendant had no reaction other than to say, "find the facts." (T. 7178-83). After making no headway with the defendant, Borges left the room at 5:00 PM. (T. 7184).

Over the next several hours, Detectives Knowles, Law, Ford, Davis, Granado, De La Torriente, Gonzalez, Cooper and Everett spoke to or questioned the defendant. (T. 7629-34). Throughout the afternoon and night, in fact for nearly eighteen hours, the defendant denied involvement. (T. 7333, 7592, 7635). Until the defendant's formal statement, none of the conversations were recorded. (T. 7186, 7192).

Borges contrasted the facts reported in the media with the facts contained in the defendant's formal statement. The media reported: the names and ages of the victims, five men were shot in the head execution style, the men had been bound and gagged with duct tape after being stripped down to their underwear, and that the victims' apartment had been ransacked as part of a drug ripoff. (T. 7405-07, 7758-63). According to Borges, facts only appearing in the defendant's statement were: St. Charles was confronted downstairs and taken upstairs by the defendant, the victims were eating when confronted in the apartment, the position of the bodies, the

defendant closed the apartment door when he left and a .45 caliber gun was used. (T. 7409-15, 7436-37). Borges maintained that before the defendant's statement, the police were unaware that the defendant wore camouflage clothes and dark glasses, that the defendant had purchased a jacket for use in the offense, and that St. Charles was approached on the street by the defendant. (T. 7554-58).

Borges noted that in the defendant's confession, the defendant claimed that Antwan Davis served as his getaway driver. Borges later learned that Davis was actually in prison on January 21, 1997. (T. 7656-57). Also, Borges attempted to locate paperwork documenting the alleged pawn transaction involving Thornton. He found none. (T. 7354-55, 7446).

Borges said that Eunice Cooper never told him that she had information about the homicides. (T. 7528-29). Borges did not find out about Anthony Strachan until May, 2008, more than eleven years after the homicides. (T. 7523-24).

Finally, Borges testified that he prepared a second report in the case on May 30, 1998. That report contained a passage indicating that the defendant's fingerprints were lifted from duct tape. That passage was incorrect. (T. 7826-28).

At 11:00 PM on May 13 and at 3:00 AM on May 14, Lt. Juan Gonzalez spoke with the defendant. Gonzalez lied to the defendant about his fingerprints being found at the apartment and on duct tape. (T. 7217-19, 7293-94). The defendant told Gonzalez he wasn't there, but speculated that he could have touched some items

in a hardware store. (T. 7218-19). The defendant also told Gonzalez that he knew "Tank" and that he felt that Tank was a snitch. (T. 7219).

Firearms examiner Ray Freeman testified that all five casings and three projectiles recovered from the apartment were fired by the same gun. (T. 7894-7901, 7908). No one requested that the casings be processed for fingerprints. (T. 7917). Latent fingerprint examiner Guillermo Martin received 128 latent fingerprint cards containing 200 fingerprints from the crime scene. (T. 7968-69, 8009, 8073). Fingerprints identified as Antonio Clark's were found on the freezer door, the bedroom wall and on duct tape.[9] (T. 7999-8004). No fingerprints were matched to the defendant. (T. 8005).

Detective Eunice Cooper testified that she was friendly with Anthony Strachan's mother, Val Williams, a City of Miami Police employee. (T. 8376-78). Cooper spoke with Williams about this case before August, 1997. (T. 8381). Williams asked Cooper to conceal the information she provided because she did not want her children involved. (T. 8384). As a consequence, Cooper did not inform Borges or any other detective about Williams' information for close to 12 years.

[9] Also on the duct tape was a fingerprint belonging to George Borghi, a crime lab employee. (T. 8091-92). To Martin, the print on the tape was left as a result of Borghi's negligent mishandling of the tape. (T. 8094).

Cooper did not write a report memorializing Williams' information.[10] (T. 8383, 8483-8485).

When Cooper learned that Law and Everett were making progress in questioning the defendant, Cooper wrote 5-6 questions on a note, which contained her memory of the information received from Williams, and passed it under the door to Everett.[11] (T. 8162-66, 8367-68, 8370-71, 8485, 8493). The questions: 1) did the defendant wear army fatigues, 2) did the defendant carry a shoe box, 3) did the defendant come from the catwalk, 4) was the Haitian boy approached near a car, 5) did the defendant wear a cap, and 6) did the defendant wear dark sunglasses. (T. 8371-72). After Everett asked the defendant about the details in the note, Everett told Cooper that the defendant had admitted being involved in the homicides. (T. 8154, 8160). Sometime later, Cooper approached the defendant in the homicide office. According to Cooper, the defendant said that if he hadn't admitted it, the police would have never proved that he did it. (T. 8375).

Sergeant Willie Everett's perpetuated testimony[12] was then read to the jury.

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[10] In fact, Cooper only revealed the Williams' information when she was directly asked by the prosecutor. (T. 8135).

[11] When Everett asked Cooper for the source of the questions, she refused to respond. (T. 8150-51, 8373-74).

[12] Everett's testimony was taken on December 12, 2003. (T. 121-296).

Everett stated that he saw the defendant at the station at 3:00 PM on May 13, 1998. (T. 8199-8200). Everett watched Borges' questioning of the defendant through the two-way mirror. He observed the defendant persistently deny involvement in the five homicides and heard the defendant tell the officer to "find the facts." (T. 8207-08). At 8:00 AM the next morning, the defendant asked to call his girlfriend. (T. 8212-13). After that conversation, the defendant ate breakfast and started to cry. (T. 8217-18). Everett then lied in telling the defendant that the police had discovered his fingerprints on duct tape and on a door at the crime scene. (T. 8221, 8276-77). Everett also told the defendant that if he was religious and a good Christian, maybe God would want him to confess. (T. 8221, 8281-82). The defendant asked for a moment and then began telling Everett and Law about his involvement in the charged offenses. (T. 8223). That unrecorded conversation lasted 15-20 minutes. A statement with a stenographer was then taken some 19 hours after the defendant was first placed in the interview room.[13] (T. 8229-30, 8263-64).

Detective Kelvin Knowles was the officer who initially transported the defendant to the police station. Knowles claimed that the defendant told him that

[13] The 19-year old defendant was initially questioned for a little more than 12 hours, with breaks. (T. 8270-71). The defendant was left alone from 3:30 AM - 8:00 AM. (T. 8271).

the victims were bad people - drug dealers who worked for the devil. (T. 8645).

Prior to the defendant's interrogation, Detective Ervins Ford had only heard about the five murders, but had done nothing to investigate the case. (T. 8770). Ford monitored Borges' interrogation of the defendant. Borges told the defendant only that 5 men had been shot and killed. The defendant indicated that he knew some of the victims, but denied involvement in their deaths. (T. 8783-90).

At 7:00 PM, Ford spoke with the defendant about his background and upbringing. (T. 8793-97). The defendant said that he had studied the Bible and accurately quoted several passages. (T. 8800-02). Of interest to Ford was the defendant's reference to Gabriel, whose job it was to punish wrongdoing. The defendant said that he saw some of Gabriel in himself. When Ford asked if the victims were killed as punishment by God, the defendant said that they should have seen it coming - they were selling drugs for a long time. (T. 8800-04, 8890-92).

Sharon Hines, a criminalist employed by the Miami-Dade crime lab testified that she conducted a DNA analysis of several items taken from the crime scene, including duct tape. (T. 8918-19, 8929). Hines did not find the defendant's DNA on any of the items. (T. 8929).

Diane Odom, the defendant's girlfriend, testified that she was living with the

defendant in May, 1998.[14] Odom said that the defendant left with the police at 3:00 PM. Later, she tried to contact the defendant 5-10 times, but the police would not put her through. (T. 9018, 9053-54, 9066). The next day, she received a call from the defendant at about 10:00 AM. (T. 9014-19). The police then brought Odom to the station. She found the defendant crying. Although the defendant did not tell her that he had committed the homicides, the defendant did tell Odom that he had to come clean to get right with God. (T. 9020-21, 9067). Odom then accompanied the defendant and the police to a location to look for a gun.[15] (T. 9024). During the ride, Odom did not think that the defendant was under arrest because he was not handcuffed or restrained in any way. (T. 9074-75).

Dr. Bruce Hyma, a Miami-Dade County Medical Examiner, testified that Dr.

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[14] Odom testified that throughout the time she was with the defendant, she never saw him with a gun. (T. 9061).

[15] In response to the prosecutor's question, Odom stated that the defendant said nothing during the ride in the van about her life being in danger. (T. 9028-29). The defense later claimed that the prosecutor's question misled the jury to believe that the defendant had not communicated the threat to Odom. The defense maintained that the State "opened the door" to testimony about the defendant's call to Odom from the police station. (T. 9036-42). During that call, the defendant told Odom that their family had been threatened, that people were out to kill their family and that the defendant was told that if he confessed, the police would protect them. (T. 9045). The court ruled that the prosecutor had not "opened the door" and refused to allow the proffered testimony. (T. 9042-43). Odom was permitted to testify that after the police dropped her off, she moved from her home because she was afraid. (T. 9033-34).

Siebert performed the autopsies on the victims. (T. 9115). To prepare for his testimony, Dr. Hyma reviewed and relied upon photographs taken by Dr. Siebert, Dr. Siebert's narrative regarding his observations, Dr. Siebert's sketches[16] and records relating to biological evidence that had been preserved. (T. 9114, 9117-18, 9195-96). Dr. Siebert found five bodies at the scene at 2:00 AM.[17] All five had rigor mortis. Based upon that finding, Dr. Hyma stated that the time of death for the victims was between 3:00 PM and 7:00 PM. (T. 9128-31).

Dr. Hyma said that Thomas had been shot in the head with a gun that was consistent with a .45 caliber weapon. Dr. Hyma observed stippling near the entry wound, signifying a shot fired at close range. (T. 9137-38). The gunshot caused immediate loss of consciousness and death. There was no pain or suffering. Thomas' body bore no defensive wounds. (T. 9141-43).

Dr. Hyma's findings regarding Melvin, Copeland, and St. Charles were the same as those for Thomas, except that there was no stippling at the wound sites. (T. 9146-50, 9159-66). Dr. Hyma's findings were similar for McGuire, except McGuire survived until 11:00 AM the following day. (T. 9151-58).

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[16] The sketches were created from observations Dr. Siebert made at the crime scene. (T. 9120-23).

[17] The defendant interposed a standing confrontation objection to Dr. Hyma's narration of Dr. Siebert's findings. (T. 9128).

Dr. Hyma testified that he could not determine the order in which the victims were shot based upon an examination of the bodies. (T. 9206, 9227).

At the conclusion of Dr. Hyma's testimony, the State rested its case. A motion for judgment of acquittal made by the defense was denied by the court. (T. 9259-9279).

The defendant testified that he did not commit the charged murders. (T. 9280). The defendant said that he made a statement to the police because the police had told him that his family was in danger. (T. 9281).

The defendant said that in May, 1998, his aunt informed him that the police were looking for him and had left a business card. The defendant called Detective Knowles and arranged to be picked up. (T. 9303-05). Knowles told him that he had a bench warrant for a traffic case and that homicide detectives wanted to talk to him. (T. 9307-10). The defendant thought it was about the death of his friend, Gosha. (T. 9311).

The defendant said that he knew about the charged murders from television, the newspaper and the neighborhood. (T. 9285, 9324, 9327-28). The defendant knew or heard of Tank, St. Charles and Thomas and that Tank sold marijuana. (T. 9314-18). The defendant also knew Frank and "Tote" from the neighborhood. (T. 9418). At the station, the defendant met Detectives Everett and Law. (T. 9419). After the defendant signed the Miranda form, he was asked questions by

Everett and Law about Gosha. (T. 9424-25). Everett then left and Borges came in. (T. 9425).

Borges asked the defendant about the charged murders. The defendant told Borges that he knew about the case from the media and the neighborhood. He also admitted to knowing Tank, St. Charles and Thomas. (T. 9427-28). Borges pulled out a stack of photos depicting the victims and the crime scene and asked the defendant to identify the victims. The defendant saw the victims on the floor, bound and gagged by duct tape. The defendant thought he recognized Tank and St. Charles. (T. 9428-36). Borges then took back the photos, got aggressive, stood up and told the defendant that he was the killer and that the police knew that he was at the scene. (T. 9440-47). The defendant denied killing anyone. (T. 9450). The defendant claimed that Borges told him that his prints were at the scene; Borges pulled out a paper that had the defendant's name and the words "preliminary" and "fingerprints" on it. (T. 9453). The defendant again denied killing anyone and said he did not know what Borges was talking about. The defendant then asked Borges for a lawyer. (T. 9454-55). Borges told the defendant that he would fry and that a devil in a suit (a lawyer) could not save him. (T. 9464).

After Borges left, Everett came back in. The defendant said that Everett also told him that his fingerprints were at the scene. The defendant rejected Everett's suggestion that he confess and asked Everett for a lawyer. (T. 9469).

After Everett left, a string of detectives went in and out of the interview room. (T. 9472). The defendant read bible passages with Detective Ford. The defendant said that Ford told him that the victims were bad guys and deserved what they got. (T. 9498, 9507). The defendant testified that Knowles told him that they had his fingerprints at the scene. (T. 9521-22). The defendant told Knowles that he didn't kill anyone and to get his facts straight. The defendant maintained that if the police investigated, they would see that he was innocent. (T. 9523-24).

The defendant said that throughout the questioning, he was given some of the facts of the case, including information about duct tape and that a .45 was used.[18] (T. 9538, 9540-41). The defendant grew frustrated and tired of repeatedly asserting his innocence. (T. 9557-58). Finally, the questioning ended and the defendant was left alone to sleep. (T. 9572).

When he woke up, the defendant was joined by Law, who had a crazed look on his face. The defendant said that Law told him that he had talked to Gosha in his sleep and that Gosha had told Law who had killed him. (T. 9584-88). The defendant told Law that if he talked to Gosha, Gosha could tell Law what happened

[18] One officer asked the defendant where his .45 was, like the big guns the defendant toted on the street. The defendant responded, "tote guns, I don't own a gun." (T. 9540).

to him; "he can tell you man, I'm not involved with nothing that's crazy."[19] (T. 9587). Law then took off his badge and spoke to the defendant in "ebonics." Law told the defendant that they knew the defendant didn't do the murders, but word on the street was that the people who murdered Gosha wanted to kill the defendant next.[20] (T. 9595-9604). Law thought that Frank had something to do with the murders. (T. 9605). Law told the defendant that he could leave and possibly subject his family and himself to danger, or he could help the police by giving them a statement. (T. 9609-10).

The defendant called Diane Odom. His conversation with Odom made him feel that he could not allow harm to come to his family, so the defendant decided to speak to the police in order to protect his family. Law told him that he would only have to stay in custody for three months; enough time to draw out the real killers.

[19] The defendant told Law that Gosha could tell Law about the defendant's character. (T. 9589).

[20] In response, the defendant asked Law why they would want to kill him since "I ain't did nothing to nobody." (T. 9604). Law told the defendant that he might be misunderstood because of his relationship with Gosha. (T. 9604-5). The defendant admitted that he had done some things, but had gotten his life together. (T. 9606). Unlike Gosha, who worked for a fast food restaurant, but had a car with an expensive paint job and $12,000 wheel rims, the defendant said he didn't own a car or fancy clothes. The defendant said that merely because Gosha was his friend did not make him guilty of the things that Gosha did. (T. 9608, 9611). He denied hurting anyone or taking anything from anyone. (T. 9609).

(T. 9612-16, 9620). Law and Everett gave him facts and the defendant expanded upon them. (T. 9620-27, 9633-37). Information about the clothing he wore during the incident came from Everett. (T. 9643, 9661-62). Law told him his theory about what had happened in the apartment,[21] including the fact that a .45 was used,[22] and Everett wanted the defendant to involve Frank in the incident. (T. 9659, 9666, 9701). The defendant mentioned Davis as his getaway driver, even though he knew Davis was in prison at the time. (T. 9693-94). The defendant said the entire statement was false or fake. (T. 9644, 9697). After the statement, Cooper gave him her card and told him that if his family had problems, they should call her for help. (T. 9804). When the defendant remained in custody beyond ninety days, the defendant realized that the police had reneged on their agreement. (T. 9824).

[21] Law told him several details, such as: Tank's nephew was found by the couch, money and jewelry were taken, the order the victims were shot and the victims were shot in the head. (T. 9713, 9731-32, 9800). The defendant could not recall if he made up the part about sending Tote to the store for duct tape, or whether Law had told him that. (T. 9717). The defendant made up other details, such as wiping up his fingerprints and the place where he "disposed" of the murder weapon. (T. 9746, 9775).

[22] The defendant didn't know how many rounds a .45 held. He said that he was told that the gun held 7 rounds. (T. 9738). Additionally, the defendant mistakenly used the term "hammer" to describe a "clip." He was corrected and advised of the proper term. (T. 9738-39).

On cross examination, the defendant stated that in 2000, he provided notes to Dr. Richard Ofshe about his police interrogation and that in 2001, he talked about the interrogation with Ofshe in a recorded interview. (T. 9944-47).

The prosecutor then engaged in the following exchange with the defendant:

Q. Mr. Calloway, isn't it true that February 2, 1996, you were in possession of a firearm, a Taurus .38 caliber automatic?

Defense Counsel: Previously made objection.

Court: Overruled.

A. Correct.

Q. Isn't it true that the possession of that firearm resulted in a court case against you charging you with the criminal offense of carrying a concealed firearm, is that true, sir?

Defense Counsel: Same objection.

A. Correct.

(T. 9978). Over defense objection, the prosecutor then asked the defendant if he had planned a robbery with Gosha three days before Gosha's death. (T. 9983). The defendant denied the allegation. The defendant explained that he told Law that three days prior to Gosha's death, he was the victim of a robbery involving Gosha. (T. 9983-84). The defendant claimed he told Detective Pereira the same thing. (T. 9985). The defendant acknowledged that Gosha did robberies and did not hold down a regular job, but was unaware of the specifics of Gosha's activities. (T.

10000).

The defendant said that while they were in the van, he did not tell Diane Odom that their family was in danger; he told Odom about the danger on the phone before she came to the station. (T. 10004, 10085). The defendant told Odom to move out of their home and she did so on the same day. (T. 10117).

The defendant admitted that he told Ofshe that he made up the part of his statement involving sending Clark to get tape and to talk to Frank. (T. 10050, 10055, 10064). He could not specifically remember which details he made up and which details were given to him by the police. (T. 10120). The defendant's bottom line was that the police had tricked him. (T. 10120).

The defendant stated that he was two months shy of 20 when he spoke to the police. (T. 9973). At that time, he was tired, naive and ignorant. He trusted the police, but realized with the passage of time that the police would not honor their arrangement. (T. 10090-91, 10098-99).

Dr. Richard Ofshe, a professor at Cal-Berkeley, holds a doctorate in social psychology and has extensively studied human rational decision making. He has studied police interrogations, the phenomenon in which a person is shifted from denial to a desire to confess, and police techniques that cause a person to falsely confess. (T. 10186-10192). Ofshe has published on influence and police interrogations, has taught officers, judges and attorneys about false confessions, and

has testified as an expert more than 200 times in 37 states. (T. 10194-99).

Ofshe cited several studies involving the incidence of false confessions. A Cardozo School of Law study found that false confessions occurred in 25% of the cases studied. (T. 10263, 10290, 11342-43). The Bideau study found that false confessions occurred in 14% of the more than 300 cases studied. (T. 10296-97). In Ofshe's view, the phenomenon of false confession has been clearly established, although there is no reliable estimate as to how often it occurs. (T. 10304).

In analyzing an interrogation and confession, Ofshe calls the time prior to the suspect's decision to confess, the pre-admission phase, and the period after that decision, the post-admission phase. (T. 10308).

During the pre-admission phase, Ofshe analyzes the setting of the interrogation, police efforts to change the suspect's perception of his current or future situation, and the tactics used by the police to motivate the suspect to move from denial to admission. (T. 10316). One method used to change the suspect's perception is the introduction of an evidence ploy; evidence used to link the suspect to the crime. The ploy is designed to accentuate the suspect's feeling that the situation is hopeless. (T. 10319-21). Motivation tactics are psychologically coercive ploys, such as linking a confession to little or no punishment, or linking continued denials to strong punishment. (T. 10323, 10326-28). Ofshe testified that a psychologically coercive motivator is an essential ingredient in an

interrogation producing a false confession. (T. 10331). Ofshe opined that a suspect's desire to protect his family is a powerful motivator in the decision to confess. (T. 10329).

Ofshe analyzes the suspect's confession details for police or other contamination[23] and compares the admission details with objectively known facts developed in the investigation. Admission details that match the objectively known facts support the notion that the confession is not a false confession. (T. 10311-13). Following that portion of Ofshe's testimony, over defense objections, the court ruled that Ofshe would not be permitted to testify about his comparison of the defendant's confession with the other evidence, or to specifically discuss conflicts between the defendant's confession and the other evidence in the case.[24] (T. 10411, 10417).

In preparation for his analysis and testimony, Ofshe reviewed the depositions of all of the officers who participated in the interrogation, crime scene reports, the statements of Strachan and Odom, the defendant's statement, notes and interview. (T. 10338-39).

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[23] Ofshe testified that the existence of a recording of the interrogation is significant in analyzing the process. Recording generally eliminates improper conduct and helps identify contamination of the suspect through purposeful or inadvertent transfer of information from the police to the suspect. (T. 10335-336).

[24] The defendant's motion for mistrial, which was premised upon the court's limitation of Ofshe's testimony, was denied. (T. 11362-63).

Ofshe noted that the police repeatedly used evidence ploys in this case;[25] significantly, they told the defendant several times that his fingerprints were found at the scene. (T. 10448). In Ofshe's view, the police tried to convince the defendant that the police had incontrovertible evidence of the defendant's guilt to make the defendant believe that he would not "survive" the interrogation. (T. 10448-49). In this case, the ploy did not work; the defendant initially did not confess. (T. 10449). The police, through Detective Law, then added a very powerful motivator; the threat that death or harm would come to the defendant's family and girlfriend if he did not confess. (T. 10450-52, 10685, 11354-55). Ofshe found it significant that the defendant agreed to confess minutes after Law utilized the powerful motivator when he was alone with the defendant. (T. 10474-75, 10687-89).

Ofshe testified that to determine the reliability of the defendant's statement, the jury should objectively evaluate the information in the defendant's statement to see if the defendant provided new information or information stemming from police or media contamination. (T. 10458, 10464, 10468-69, 11358-59). Ofshe noted that there was significant evidence of contamination in this case. As an example of

[25] The police used false evidence, victim blaming, appeals to religion and friendliness among their tactics. (T. 10474). In Ofshe's opinion, the quality of the police interrogation was poor. (T. 10511).

contamination, Ofshe cited the fact that information from Cooper's note made its way into the defendant's statement. (T. 10484-85). Ofshe opined that if new information in the defendant's statement was corroborated by objective facts, the statement was likely reliable, if it was not, it was likely unreliable. (T. 10460).

On cross, Ofshe said that the defendant told him that he made up the part of his confession where he said that he sent Clark to ask Frank for orders about who to kill. (T. 10887-88). In response to several references by the prosecutor to statements purportedly made by Clark, Ofshe testified that he was aware of those statements because he raised the issue with the defendant. (T. 10889-90, 10892). Ofshe acknowledged that it was inconceivable that the defendant would make up something that Clark also said. (T. 10892-93). Over defense objection, the prosecutor also elicited that the same conflict existed between the defendant's claim that he made up the part about sending Clark for duct tape and Clark's statement. (T. 10894-95). Ofshe was not able to tell if the defendant had lied about the two statements or had a memory error. (T. 10895-900).

Ofshe said that the defendant thought he made up the part about the killer wearing camouflage clothing. (T. 10905). Ofshe, however, disregarded what the defendant said about the issue. In Ofshe's view, the evidentiary chain connecting Strachan, Cooper's note and Everett demonstrated police influence on the defendant, who merely adopted the fact given to him by the police. (T. 10923).

Ofshe testified that a defendant's life experience and lack of familiarity with police procedure could put a defendant at a disadvantage in an interrogation. However, a prior arrest is not as important as the events in an interrogation. In Ofshe's view, the defendant demonstrated some distrust of the police. (T. 11151-54). Ofshe conceded that the police account of the interrogation was irreconcilable with the defendant's account. (T. 11158). The police ploys and motivators used per the defendant's account could plausibly cause a false confession. (T. 11158). However, if the defendant lied in his account, Ofshe would deem those lies relevant to his opinion. (T. 11223).

On re-direct examination, Ofshe noted that he had asked the defendant to provide details about the interrogation more than three years after it had occurred. (T. 11393). Under the circumstances, a person's memory was bound to be hit or miss. (T. 11393). However, Ofshe noted several areas in the defendant's notes and interview that were consistent with the testimony the defendant provided in court. (T. 11432-55).

Rupert Butcher, a print examiner for the City of Miami Police, testified that the duct tape should not have been commingled in one bag. (T. 11469, 11481-83). Butcher said that in 1998, it was possible to have sent the duct tape for DNA testing, but it was not sent. (T. 11495-99).

The State recalled Detective Law as part of its rebuttal case. Law stated that

he never heard Borges raise his voice with the defendant or saw Borges hand the defendant a stack of photos or a police report about fingerprints.[26] (T. 10997-99). Law denied telling the defendant that he was the next to be killed, that he should falsely confess so that the real killer would come out, or that he would only serve three months in jail if he confessed. (T. 11008-16). Law denied that he or Everett coached the defendant regarding what to say. (T. 11018-21).

Law testified that the defendant told him that the last time the defendant saw Gosha was when he and Gosha planned the robbery of Twin. It turned out that the Twin robbery was a real case. (T. 11033-36).

Lt. Pereira testified about the defendant's alleged involvement in a robbery with Gosha. Pereira stated that the defendant told him that he and Gosha planned the robbery of Twin. Twin supposedly had a lot of money. The defendant went to Twin's house and left the door unlocked to allow the robber to enter.[27] (T. 11108-09). Dr. Michael Welner, a forensic psychiatrist, was hired by the State to provide an opinion in this case. (T. 11563, 11608-35). Welner testified that in cases

[26] Detective Ford said the same thing. Ford added that the defendant brought up religion with him. He didn't. (T. 12381-88).

[27] After Pereira concluded his testimony, the defense moved for a mistrial, claiming that the Twin robbery had become a feature of the case. (T. 11126). The court denied the motion. (T. 11128).

involving disputed confessions, he works for the State about 80% of the time. (T. 11635). Although Welner conceded that false confessions do occur,[28] he is critical of the methodology utilized by Ofshe to analyze interrogations. (T. 11639-44). He has opposed Ofshe in court on three occasions. (T. 11660).

Welner said that false confessions occur as the result of the interplay of three things: the defendant's vulnerability, the context of the questioning and police manipulation of the defendant. (T. 11720). The defendant's vulnerability generally refers to his suggestibility and compliance traits. (T. 11731, 11741-42). Other factors that might motivate the defendant to confess are the defendant's perception of the proof against him, external pressure used by the police and internal pressures, such as a guilty conscience or remorse. (T. 11734-39).

Welner reviewed materials provided by the State and observed the defendant testify in court. In his view, the defendant did not have a compliant personality; he was not easily pushed around. (T. 11763-66). Welner also opined that there was no correlation between the number of officers questioning a suspect or the length of the interrogation and a coerced confession. It's what occurs during the interrogation that counts. In Welner's opinion, the defendant was not subjected to

[28] In fact, Welner stated that false confessions are rare. In his view, the studies frequently relied upon in the area, Cardozo, Radelet and Drizin, overstated the frequency with which they occur. (T. 11682-89).

an adversive environment; he never complained about the conditions or the length of his interrogation. (T. 11780-782, 11827).

Welner was critical of Ofshe's methodology in analyzing a possibly false confession, which takes into account whether the defendant's confession lines up with the objectively known facts. Welner stated that there could be many reasons why the facts would not line up: a degraded memory or a person acting out of self interest. (T. 11840-41). Welner added that when Ofshe tried to get the defendant to reconcile the conflict between the defendant's version and Clark's, "to make it come out right," it was not something an expert should do. In Welner's view, Ofshe contaminated the defendant's version. (T. 11867-68).

The prosecutor then asked Welner a hypothetical question:

> Q: If an officer told the defendant that you're the next to be killed, that your family is in danger and we know you didn't do it, give us a fake confession and you'll be out in three months, we'll flush out the killers. If it's believed, would the confession that results be false?

(T. 11944-45). Welner responded that the confession would be forced, but couldn't say if it was true or false. (T. 11945). To determine if it was false, Welner would look at the defendant's vulnerability, the context of the questioning and the manipulative tactics used by the police. (T. 11947-48). Based upon what he saw in the defendant's testimony and his review of the records, Welner opined that the defendant was not naive or compliant, and saw no evidence that the defendant was

suggestible. (T. 11955-61).

On cross examination, Welner opined that a non-police officer could not be an expert in interrogation. (T. 12005). Welner conceded that he has never sat in on an interrogation. His training has come primarily from studying literature, including Ofshe's writings. (T. 12027-29, 12043).

False confessions are generally proven upon subsequent exonerations. (T. 12058). Welner deemed a false confession to be an act of compliance; bowing to pressure and a belief that the short term benefits of the confession outweigh the long term costs. (T. 12061-63). Police actions such as threats, promises or lies about evidence can cause a suspect to confess falsely. (T. 12106, 12126, 12135). Isolation, sleep deprivation or the length of interrogation alone, or in combination, generally do not cause false confessions. (T. 12129). Finally, Welner agreed that recording an interrogation is helpful to show the legitimacy of a confession. Without a recording, anyone could say anything about what happened. (T. 12222-24, 12236-40).

Both Rupert Butcher and Guillermo Martin said the case file contained no report indicating a "preliminary match" of the defendant's fingerprints. (T. 12311, 12352-54).

Detective William Hladky testified that the Twin robbery occurred on April 21, 1998. (T. 12365). Prior to Pereira's interview with the defendant, his

investigation had revealed that the defendant was only a witness in the case. (T. 12372). He had no information that Gosha was involved in the robbery. (T. 12368).

Borges denied that he ever yelled at the defendant or showed him a police report, particularly one stating that there had been a preliminary match of the defendant's fingerprints. (T. 12421-25).

At the conclusion of Borges' testimony, the State rested its rebuttal case. The defense renewed its motion for judgment of acquittal. The court renewed its denial of the motion. (T. 12498-501).

On July 30, 2009, after three days of deliberations, the jury returned guilty verdicts on all counts. (T. 13199).

The penalty phase began on January 26, 2010. The State called a number of victim impact witnesses, including Dorothy White, Katherine Lowe, Carolyn Rafael Gloria Copeland and Errol Kelly. They each testified to the nature and qualities of their lost loved ones. (T. 13720-21, 13740-42, 13754-55, 13783, SR. 25-37).

Shante Anderson, the defendant's cousin, lived for a period of time with the defendant, the defendant's mother, Shirley Hill, the defendant's brother, Reggie, and members of her family. (T. 13815-19). Anderson noted that Hill absented herself for days at a time, paid no attention to the defendant and his brother and did not care for her children as a mother normally would. (T. 13827-29). When the defendant

was about 13, he moved with his mother to the Scott Projects. At Scott, the defendant lived in filthy, crime ridden conditions. (T. 13835-42). At that time, Hill heavily abused drugs. The defendant was often left to fend for himself and his brother for food. (T. 13843-45).

Hill testified that she was 20 years old when she gave birth to the defendant in Georgia. She never married the defendant's father, Solomon. Solomon was frequently physically abusive. The defendant often witnessed Solomon beating Hill, including one incident when Solomon tried to drown Hill in the bathtub.[29] (T. 13871-76, 13880-81). During another incident, the defendant handed Hill a bat to use in defending herself against Solomon. (T. 13894-95). Solomon also beat the defendant with a "switch." (T. 13877). While living in Georgia, Hill said that she regularly used marijuana in the defendant's presence. (T. 13893).

When the defendant was 6, Hill moved her children to Florida. (T. 13896). In Florida, her drug habit became worse. She used cocaine daily and did not care for her children. (T. 13900). She did not provide food, and on several occasions a home for her children, since they were evicted from their apartment for failure to

[29] Hill was aware that Solomon had been diagnosed by the Veteran's Administration as a schizophrenic suffering from post-traumatic disorder. The court refused to allow the defense to discuss the diagnosis. (T. 13883-85, 13888, 13890). See Issue X, infra.

pay rent. (T. 13900-02).

Hill moved to the Scott Projects when the defendant was 14. The conditions at Scott featured drug selling, fights, robberies and killings. (T. 13910). Hill became a regular crack cocaine user. From that point forward, Hill did nothing to parent the defendant. (T. 13911-13). It was up to the defendant to feed his brother. (T. 13912). At one point, Hill and her sons were evicted from Scott for failure to pay the $6 monthly rent. (T. 13914). Hill would disappear for days at a time. (T. 13922). In Hill's view, she was lost to drugs and the defendant was lost to the streets. (T. 13930).

Reverend Joan King and Juanita Perry stated that the defendant started attending church regularly about three years prior to his arrest. (T. 14013-14). While there, the defendant helped with the elderly and did janitorial services. (T. 14014-18, SR. 141-47).

Eugene Hill, the defendant's grandfather said that the defendant and his family lived with him when they moved to Florida. (SR. 43, 53). Hill supported Shirley Hill and her boys while they lived with him. When they moved out, Shirley Hill had trouble supporting herself. She was evicted from her apartment several times and would disappear for days on end. (SR. 55, 58-60, 65-66, 86). Despite this adversity, the defendant helped care for Hill's sick brother. (SR. 71-72). While the defendant was with him, Hill tried to teach the defendant life lessons and right

from wrong. (SR. 76-78).

Eugene Anderson testified that the defendant worked with him installing carpets on weekends. The defendant was a good worker. (SR. 111-17).

Reginald Calloway, the defendant's brother, testified that his grandfather was very strict with his grandsons. The defendant had many confrontations with his grandfather, which resulted in the defendant suffering regular, severe beatings with a leather belt. (SR. 167-72). Calloway said that his mother was a regular crack user, who did not pay the bills or feed her sons. The family regularly lived without electricity and was evicted from their apartment on numerous occasions. (SR. 166, 173-76). When they moved to the Scott Projects, they regularly saw drug use and shootings. (SR. 180-83). Shirley Hill frequently left the boys for days. Reginald relied upon his brother to clothe and feed him. (SR. 185-86).

At the conclusion of the penalty phase, by a vote of 7-5, the jury recommended that the defendant receive the death penalty. (T. 14311-12).

At a Spencer hearing on April 13, 2010, Dr. Jethro Toomer, a board certified psychologist, testified that he evaluated the defendant twice: in 1999 and 2008. (T. 14343, 14354, 14360). Toomer also spoke with the defendant's family members and reviewed police reports and the defendant's trial testimony. (T. 14360-61). Toomer opined that the defendant was raised in circumstances characterized by instability, an absence of structure and abandonment. Those circumstances

impaired the defendant in all areas of behavior, thinking and functioning. (T. 14362-65). The abandonment of the defendant by his parents, impacted his self esteem and created anger and resentment. It also caused the defendant to act impulsively. (T. 14365-70, 14418-19). Additionally, defendant's repeated exposure to violence at an early age impacted his development and taught him that violence was a way to resolve problems. (T. 14393-96). All of these factors help explain the defendant's behavior; in Toomer's view, the defendant is the product of what he saw and experienced. (T. 14427-28, 14452-53).

On October 1, 2010, the court sentenced the defendant to death for each of his first degree murder convictions, the sentences to run concurrently, and life imprisonment on each of the remaining counts. The life sentences were to run consecutively to the death sentences and to each other. (T. 14788-89). In support of its sentence, the court found that six aggravating circumstances had been proven; prior violent felony, felony murder, avoid or prevent a lawful arrest, pecuniary gain, HAC and CCP. The first four were accorded great weight, the last two extremely great weight. (R. 9833-45). As for mitigating circumstances, the court found one statutory mitigator - the defendant's age. The court accorded that some weight. (R. 9847). The court also found twenty non-statutory mitigating circumstances that primarily dealt with the defendant's deplorable life conditions growing up. The court accorded each a range of minimal to slight to some weight. (R. 9848-9856).

In the court's view, the HAC and CCP aggravators, individually, outweighed all of the mitigation found by the court. (R. 9857).

A timely notice of appeal was filed on October 29, 2010. (R. 9900). This appeal follows.

SUMMARY OF ARGUMENT

Guilt Phase

During voir dire, defense counsel was precluded from questioning prospective jurors concerning possible bias arising from potentially applicable aggravating circumstances. The questions were designed to probe whether juror bias, emotion or attitudes about potential aggravators would limit the juror's ability to fairly weigh the aggravating and mitigating circumstances. The court's erroneous limitation of voir dire deprived the defendant of his right to a fair and impartial jury.

The court limited important defense testimony on false confessions from Dr. Ofshe. The trial court erroneously refused to allow Dr. Ofshe to discuss the testimony of any trial as part of his methodology for analyzing whether a false confession had occurred. The court's ruling severely hindered the defendant's ability to present his defense at trial.

Although the State had opened the door to the admission of statements made by the defendant to Diane Odom, the court limited the defendant's cross examination of Odom. The limitation enabled the State to willfully create a misleading

impression regarding whether the defendant had informed Odom about threats against her and her family. The misleading impression severely undermined the defendant's defense.

The trial court erroneously allowed the defendant to be impeached with evidence of collateral criminal conduct, when the defendant had not opened the door to the admission of the otherwise irrelevant evidence. The improper admission of evidence of the defendant's prior charge of carrying a concealed firearm and his planning and participation in a robbery with Gosha, who had been murdered, were solely relevant to prove criminal propensity and deprived the defendant of a fair trial.

The trial court further erred by allowing the State to impeach the defendant's testimony by questions posed of the defendant's expert, which referenced an out-of-court inculpatory statement by a non-testifying co-defendant, in violation of the defendant's right to confrontation.

The trial court erred in allowing two police witnesses to give opinion testimony about the capability or work quality of other police witnesses. The objectionable testimony constituted bolstering, which improperly invaded the province of the jury.

The trial court erred when it overruled a defense objection to the prosecutor's improper closing argument. The prosecutor told the jury that the case came down to whether they believed the police and civilians or the defendant's story. The

prosecutor's argument erroneously shifted the burden of proof to the defendant and diminished the reasonable doubt standard.

The trial court erred in allowing a substitute medical examiner to testify about findings contained in autopsy reports and materials prepared by a non-testifying medical examiner, when there was no showing that the original medical examiner was not available. Under the circumstances, the admission of the substitute's testimony deprived the defendant of his right to confrontation under the Sixth Amendment.

Penalty Phase

The trial court erroneously precluded defense counsel's closing argument challenging the quality and sufficiency of evidence relied upon by the State to prove certain aggravating circumstances beyond a reasonable doubt. The restriction of closing argument denied the defendant a fair sentencing hearing.

The trial court improperly limited the defendant's admission of mitigating evidence; the medical records of the defendant's father, which demonstrated that the father suffered from post-traumatic stress disorder and schizophrenia. The records corroborated the testimony of the defendant's mother and were relevant to proving defendant's severely abusive childhood.

Finally, the imposition of a death sentence based on a bare seven-five jury majority and a judicial finding of aggravating circumstances never found by a

unanimous jury beyond a reasonable doubt violates the state and federal constitutions and *Ring v. Arizona,* supra.

ARGUMENT

I

THE COURT ERRED IN LIMITING DEFENSE COUNSEL'S VOIR DIRE QUESTIONING OF PROSPECTIVE JURORS, WHERE COUNSEL'S QUESTIONS APPROPRIATELY PROBED POSSIBLE JUROR BIAS THAT COULD HAVE IMPACTED THE JUROR'S ABILITY TO FAIRLY WEIGH AGGRAVATING AND MITIGATING CIRCUMSTANCES, THEREBY DEPRIVING THE DEFENDANT OF HIS RIGHT TO A FAIR AND IMPARTIAL JURY.

"It is apodictic that a meaningful voir dire is critical to effectuating an accused's constitutionally guaranteed right to a fair and impartial jury."[30] *Lavado v. State*, 492 So. 2d 1322 (Fla. 1986), adopting the dissent in *Lavado v. State,* 469 So. 2d 917, 919 (Fla. 3rd DCA 1985). "Without an adequate voir dire the trial judge's responsibility to remove prospective jurors who will not be able impartially to follow the court's instructions and evaluate the evidence cannot be fulfilled." *Rosales-Lopez v. United States,* 101 S. Ct. 1629, 1634 (1981) and *Solorzano v. State*, 25 So. 3d 19 (Fla. 2nd DCA 2009). In the case at bar, the defense was denied an

[30] While the scope of voir dire questioning rests in the sound discretion of the court, (see *Vining v. State*, 637 So. 2d 921 (Fla. 1994), like all such judicial discretion, it is not unlimited. *Ferrer v. State*, 718 So. 2d 822 (Fla. 4th DCA 1998).

adequate voir dire because the trial judge improperly restricted defense counsel's ability to uncover possible juror bias and to obtain assurances that the jurors would fairly follow the law. As a consequence, the defendant was deprived of his right to an impartial jury.

During voir dire, the defense wanted to flesh out any pre-conceived notions the jurors had about certain aggravating circumstances, so that the defense could be assured that the jurors could still fairly weigh the aggravating and mitigating circumstances and consider both sentencing possibilities. (T. 3219, 3226, 3231-32). For example, defense counsel wanted to ask the jurors if there was anything about the HAC aggravating circumstance that would render them unable to follow the law. The defense did not wish to ask any jurors what their sentencing recommendation would be if a certain aggravator was found to exist. Instead, defense counsel wished to simply ask whether the jurors harbored strong feelings about an aggravator, such as HAC or CCP, that they could not follow the court's instructions to fairly weigh the aggravating and mitigating circumstances and consider all applicable penalties. The court ruled that the defense could not discuss individual aggravators and precluded the line of questioning.[31] (T. 3238, 3247, 3265, 3277).

[31] Curiously, the court carved out a single exception to its blanket refusal to permit the line of questioning; the court allowed questions concerning the pecuniary

This Court has recognized that "the average juror summoned for prospective service in a case where the State is seeking the death penalty enters the courtroom without any true insight whatsoever into the elements or factors involved in capital sentencing proceedings....They similarly do not possess the requisite familiarity with the necessary balancing scheme whereby aggravating and mitigating factors are weighed against each other in an effort to produce a proportionate sentence." *Overton v. State*, 801 So. 2d 877, 893-94 (Fla. 2001). Once the jurors are informed of the varying aggravators and mitigators and the weighing process, it is incumbent upon the attorneys to inquire about juror bias relating to those factors that could impair their ability to fairly apply and follow the law.

Defense counsel's need to ask about matters relevant to juror bias is not limited to matters relevant to the elements of the crime charged or an affirmative defense. *Campbell-Eley v. State*, 718 So. 2d 327 (Fla. 4th DCA 1998). Counsel must also be free to probe matters that might create strong prejudicial feelings that would impair the jurors' ability to follow the court's instructions on the law. *Lavado v. State*, supra, and *Ingrassia v. State*, 902 So. 2d 357 (Fla. 4th DCA 2005). Restriction of that right of inquiry has frequently resulted in reversal of the defendant's conviction.

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gain aggravator. (T. 3262, 3281).

In *Campbell-Eley v. State,* supra, the defendant was charged with second degree murder in the death of a pregnant woman. The defense sought to question the jurors about their ability to be fair and follow the law in a case where the victim was pregnant and the fetus did not survive. The court refused to permit the inquiry. The Fourth District reversed the defendant's murder conviction, reasoning that the defense was entitled to probe the jury's bias and strong emotional feelings about the fact that the killing of a mother and fetus constitutes only one murder. The court's restriction of that inquiry limited the defendant's ability to conduct a meaningful voir dire on an important matter that could have impacted the jury's ability to follow the law.

In both *Moses v. State*, 535 So. 2d 350 (Fla. 4th DCA 1988) and *Johnson v. State*, 590 So. 2d 1110 (Fla. 2nd DCA 1991), the courts reversed the defendant's convictions because defense counsel was not permitted to probe the jurors' possible bias about the fact that the defendants were convicted felons. In both cases, the courts held that the defendants were entitled to question the jurors' about their ability to fairly reach a decision given their knowledge of the defendants' status. See also *Perry v. State*, 675 So. 2d 976 (Fla. 4th DCA 1996)(improper for trial court to restrict defense counsel's inquiry about jurors' beliefs as to whether a person could falsely confess to a crime).

Finally, this Court's opinion in *Geralds v. State*, 111 So. 3d 778 (Fla. 2013) is instructive. In *Geralds*, the prosecutor commented on a number of aggravating circumstances, including HAC, CCP and pecuniary gain. The prosecutor then discussed a number of mitigating circumstances and asked jurors whether they could weigh the penalties in light of evidence of that nature. Noting that probing a juror's attitude about a particular legal doctrine is essential to a determination of whether cause or peremptory challenges should be made, this Court found that the prosecutor's questions, which did not reference the facts of the case, were proper inquiry of the jurors' views regarding legal doctrines and the death penalty.

Similarly to the prosecutor in *Geralds*, defense counsel sought only to question the jurors about aggravating circumstances that might apply in the case and inquire about whether any possible bias concerning those circumstances would prevent the jurors from fairly engaging in the weighing process, as required by law. Defense counsel did not proffer any of the facts of the case or seek to ask any hypothetical questions which included the facts. Defense counsel's questions were essential to a meaningful voir dire, especially in a case involving the prosecution of five homicides. The trial court seemed to recognize this need to some degree. The court permitted inquiry about possible bias relating to the fact that five homicides were charged and the pecuniary gain aggravator. However, the permitted inquiry did not go far enough. Meaningful voir dire would have included inquiry about bias relating to the

possible application of other aggravators such as HAC and CCP, which would have enabled counsel to make educated choices about appropriate challenges, cause or peremptory. That did not happen. The court's improper restriction of counsel's voir dire deprived the defendant of his right to a fair and impartial jury, which, under the authority of *Lavado, Campbell-Eley, Moses, Johnson* and *Perry,* compels reversal.

II

THE TRIAL COURT ERRED IN LIMITING THE TESTIMONY OF THE DEFENDANT'S EXPERT, DR. RICHARD OFSHE, WHERE OFSHE WAS PREVENTED FROM TESTIFYING ABOUT THE FACTS HE REVIEWED AND RELIED UPON AS PART OF HIS METHODOLOGY IN EVALUATING AND DESCRIBING THE HALLMARKS OF A FALSE CONFESSION.

To prove its case against the defendant, the State primarily relied upon the defendant's confession, which was obtained after an interrogation that lasted nearly eighteen hours. There was no physical evidence tying the defendant to the crimes charged.

In opposition, the defense maintained that the defendant's confession was false; a fictional construct which was the product of trickery, deception and false threats. In support of its position, the defense called Dr. Richard Ofshe, a social psychologist, who, for more than 20 years, has taught, published and testified as an

expert more than 200 times on influence, police interrogation and the phenomenon of false confessions. (T. 10186-199).

In preparation for his analysis and testimony, Ofshe reviewed the depositions of all of the officers who participated in the interrogation, crime scene reports, the statements of Strachan and Odom, the defendant's statement, notes and interview. (T. 10338-39). Ofshe was also permitted to view the trial testimony of the defendant. In analyzing an interrogation and confession, Ofshe calls the time prior to the suspect's decision to confess, the pre-admission phase. (T. 10308). During the pre-admission phase, Ofshe analyzes the setting of the interrogation, police efforts to change the suspect's perception of his current or future situation, and the tactics used by the police to motivate the suspect to move from denial to admission, including evidence ploys, which are the use of evidence that officers claim link the suspect to the crime. (T. 10316-21). Ofshe noted that the police utilized several ploys, including falsely informing the defendant that his fingerprints were found at the scene. (T. 10448). Ofshe also noted that the police also utilized a powerful coercive motivator; they informed the defendant that he and his family were in danger if he did not confess. (T. 10450-52, 10685, 11354-55). Ofshe stated that a psychologically coercive motivator is an essential ingredient in an interrogation producing a false confession. (T. 10331).

In the post-admission phase, Ofshe analyzes the details of the confession for contamination from the police or other sources and compares the confession details with objectively known facts developed in the police investigation. Confession details that match the objectively known facts support the notion that the confession is not false. (T. 10311-13).

It was there that the trial court interceded and refused to allow Ofshe to review for the jury his analysis and comparison of the defendant's confession with the objectively known facts. The defense maintained that Ofshe's analysis was no more than the expert's recitation of facts received prior to and during the trial that he used in formulating his opinion. (T. 10396, 10401-403). The court, however, ruled that Ofshe would not be permitted to provide his analysis. To the court, the "facts" were for the jury to determine and were outside the purview of expert testimony. (T. 10400, 10404, 10411, 10417). The court limited Ofshe's testimony to a simple statement that a conflict between the defendant's confession and other evidence was a factor for the jury to consider. (T. 10413).

Subsequently, the court further limited Ofshe's testimony by completely precluding Ofshe from discussing the testimony of any other witness. After the State made a point in its cross examination that Ofshe would have to believe the defendant's account to find support for his claim of a false confession, the defense sought to have Ofshe discuss the testimony of Strachan as an example of other

evidence that was corroborative of the defendant's false confession claim. (T. 11408). The court refused to permit Ofshe to discuss Strachan's testimony, stating that it was for the jury to determine the facts in deciding the weight to be given to Ofshe's opinion, not for Ofshe to find the facts. (T. 11414).

The court's limitation of Ofshe's testimony was plainly error.[32]

Section 90.704, Florida Statutes (2012) provides, in pertinent part, that:

> "The facts or data upon which an expert bases an opinion or inference may be those perceived by, or made known to, the expert at or before the trial."

The cases applying this statute have broadened the basis of expert opinion to include information obtained from numerous sources and leave the reasonableness of the expert's reliance on this data to be questioned on cross examination. *Bender v. State*, 472 So. 2d 1370 (Fla. 3rd DCA 1985) and *Schwarz v. State*, 695 So. 2d 452 (Fla. 4th DCA 1997). As has always been the case, the jury is free to accept or reject an expert's opinion or give it the weight it deserves, based upon the expert's qualifications, the basis for the expert's opinion and the evidence. *Parrish v. City of Orlando*, 53 So. 3d 1199 (Fla. 5th DCA 2011).

[32] A trial court's decision on the admissibility of expert testimony is reviewed for an abuse of discretion. *Harrison v. State*, 333 So. 3d 727 (Fla. 1st DCA 2010).

In this case, the defense sought to have Dr. Ofshe review and compare the "uncontaminated" portions of the defendant's confession with facts that Dr. Ofshe viewed as being objectively known. To Dr. Ofshe, that portion of his methodology was essential to helping the jury decide whether a false confession existed in this case. In fulfilling its role, the jury was free to reject Dr. Ofshe's opinion if it disagreed with Dr. Ofshe's view of the facts. However, they were not given that opportunity because of the trial court's limitation of Dr. Ofshe's testimony. In doing so, the court deprived the defendant of a fair trial.

In *United States v. Hall*, 93 F. 3d 1337 (7th Cir. 1996), the defendant was convicted of kidnapping. Prior to trial, the police obtained a confession from the defendant. At trial, the defense sought to challenge the confession by utilizing Dr. Ofshe. The trial judge excluded Dr. Ofshe's proffered testimony because: 1) Dr. Ofshe would assess the credibility of the officers who received the defendant's confession to determine what happened during the interrogation, and 2) Dr. Ofshe's testimony would not assist the jury. The Seventh Circuit reversed, finding that the jury should have been permitted to hear Dr. Ofshe's opinion. In addition to educating the jury about the phenomenon of false confession, the Court found that Dr. Ofshe's methodology would have helped the jury decide whether the defendant's confession fit the facts of the case being tried. Significantly, the Court remarked:

> "The government is entitled to argue its version of these facts to a jury, in support of its theory about the validity of the confession, but [the defendant] was entitled to present his own theory to them as well, including the likelihood that the "confession" added nothing to what the government already knew.
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> The fact that there was a dispute between [the defendant] and the interrogating officers about the nature of the questioning itself provides no reason to exclude the expert testimony; it is a rare case where everything is agreed except the subject matter for which the expert is presented. It is enough if the expert makes clear what his opinion is, based on the different possible factual scenarios that might have taken place."

United States v. Hall, supra at 1345-46.

In *Dorbad v. State*, 12 So. 3d 255 (Fla. 1st DCA 2009), the defendant was convicted of second degree murder. At trial, the State emphasized the defendant's calmness after a traumatic shooting, which it claimed demonstrated the defendant's cold-blooded nature. The defense sought to elicit testimony from Dr. Greer, a forensic psychiatrist. Dr. Greer reviewed depositions, officer statements and 911 tapes. In Dr. Greer's opinion, the defendant's demeanor was consistent with shock. The trial court refused to permit Dr. Greer to testify because he had not examined the defendant and had not witnessed the officers' testimony. The First District found the exclusion error and reversed. The court noted that Section 90.704 specifically authorizes an expert to provide an opinion based upon facts perceived prior to trial. In addition, an expert could opine on trial evidence that the expert had not witnessed

through the use of hypothetical questions. Finding that Dr. Greer's testimony would have allowed the jury to consider an opposing view of the evidence, the court concluded that it was error to exclude Dr. Greer's opinion. See also *Harrison v. State*, supra; *Delice v. State*, 878 So. 2d 465 (Fla. 4th DCA 2004) and *Boyer v. State*, 825 So. 2d 418 (Fla. 1st DCA 2002) for similar rulings.

In this case, the defense was dealt a damaging blow when the trial court refused to allow Dr. Ofshe to discuss the facts he relied upon to formulate opinions, including the testimony of witnesses he observed or was made known to him. The court's ruling, that the "facts" were for the jurors to find and were not for Dr. Ofshe to discuss, was a prejudicial departure from the mandate of Section 90.704 and prevailing case law.

The prejudice to the defense was compounded by the fact that the State's expert on false confessions, Dr. Welner, was permitted to play by markedly different rules. While Dr. Ofshe was not permitted to discuss the testimony of any witness in the case as a basis for his opinion, no such restriction was placed on Dr. Welner. During Dr. Welner's testimony, the prosecutor asked:

> Q: If an officer told the defendant that you're the next to be killed, that your family is in danger and we know you didn't do it, give us a fake confession and you'll be out in three months, we'll flush out the killers. If it's believed, would the confession that results be false?

(T. 11944-45). Welner responded that the confession would be forced, but couldn't say if it was true or false. (T. 11945). Welner was allowed to opine that based upon what he saw in the defendant's testimony and his review of the records, the defendant was not naive or compliant, and Welner saw no evidence that the defendant was suggestible. (T. 11955-61).

The trial court's limitation of Dr. Ofshe's expert opinion testimony was error that the State cannot prove beyond a reasonable doubt did not contribute to the verdict. *State v. DiGuilio*, 491 So. 2d 1129, 1135-36 (Fla. 1986).

III

THE TRIAL COURT ERRED IN LIMITING DEFENSE CROSS EXAMINATION OF DIANE ODOM CONCERNING THE DEFENDANT'S STATEMENTS TO ODOM ABOUT THREATS AGAINST HER FAMILY THAT HAD BEEN RELATED BY THE POLICE TO THE DEFENDANT, WHEN THE STATE HAD "OPENED THE DOOR" TO ADMISSION OF THOSE STATEMENTS AND LEFT THE JURY WITH A MISLEADING IMPRESSION THAT PREJUDICED THE DEFENSE.

Prior to trial, the State successfully moved in limine to exclude statements made by the defendant to Diane Odom about his interrogation by the police. Specifically, the court ruled that Odom would not be permitted to testify about what the defendant told her concerning threats related by the police against him, her and their family. (T. 2258-62).

During the State's questioning of Odom about what had occurred when Odom and the defendant were taken by Everett and Law to look for the murder weapon, the following exchange occurred:

> Q: Were you at that time, Ms. Odom told by Tavares Calloway that your life could be in danger?
>
> A: No. Not at that time, no.
>
> Q: Were you told that you needed to be careful and watch out at that time?
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> A: No. I don't remember at that time. No. Not at that time.

(T. 9028-29).

Based upon that exchange, defense counsel argued that the prosecutor had "opened the door" to admission of the defendant's statements to Odom about threats against their family that had been relayed by the police. (T. 9036-42). The defense maintained that if the defendant's statements were not admitted, the jury would be mislead into believing that the defendant had never told Odom about the threats and would not understand the full context of Odom's conversations with the defendant. (T. 9038-45). The defense proffered that Odom would say that during a phone call, the defendant told Odom that their family had been threatened, that people were out to kill their family and that the defendant was told that if he confessed, the police would protect them. (R. 6352-55, T. 9045). The court ruled that the prosecutor had not "opened the door" and refused to allow the defense to elicit the proffered

testimony on cross examination. The court's ruling was plainly wrong and significantly harmful to the defense.[33]

Regarding the proper scope of cross examination, this Court noted:

> [T]he rule limiting the inquiry to the general facts which have been stated in the direct examination must not be so construed as to defeat the real objects of the cross examination. *One of these objects is to elicit the whole truth of transactions which are only partly explained in the direct examination. Hence, questions which are intended to fill up designed or accidental omissions of the witness, or to call out facts tending to contradict, explain or modify some inference which might otherwise be drawn from his testimony, are legitimate cross examination*.

McRae v. State, 395 So. 2d 1145, 1152 (Fla. 1981), quoting from 4 *Jones on Evidence, Cross Examination of Witnesses* 25:3 (6th Ed. 1972).

In allowing a party to get to the "whole truth of transactions" on cross examination, courts have developed the evidentiary concept of allowing a party to respond on cross examination when an adverse party "opens the door:"

> "[A]s an evidentiary principle, the concept of 'opening the door' allows the admission of otherwise inadmissible testimony to 'qualify, explain, or limit' testimony or evidence previously admitted. The concept of 'opening the door' is 'based on considerations of fairness and the truth seeking function of a trial.'" *(citations omitted).* This principle is triggered when one party's evidence presents 'an incomplete picture' and fairness demands the opposing party be allowed to 'follow up in order to clarify...and make it complete."

[33] A trial court's ruling on an evidentiary issue is reviewed under an abuse of discretion standard. *Hudson v. State*, 992 So. 2d 96, 109 (Fla. 2008).

Brunson v. State, 31 So. 3d 926, 928 (Fla. 1st DCA 2010); *Washington v. State*, 758 So. 2d 1148, 1155 (Fla. 4th DCA 2000).

In this case, the prosecutor was fully aware of the court's pre-trial determination that statements made by the defendant to Odom concerning threats by others against the defendant's girlfriend and family were inadmissible. The prosecutor was also aware that Odom had told the police that the defendant had informed her of the threats during a phone call. Capitalizing on the court's pre-trial ruling, the prosecutor asked Odom about whether the defendant had communicated those threats to her while they were in the police van, knowing that Odom's answer would be "no." Under those circumstances, the jury could easily have been misled to believe that the defendant had not communicated the threats to his girlfriend, when in fact, per Odom, that was not the case. The defendant's proffered cross examination was designed to clarify that misconception and give the jury the complete context of the defendant's conversation with Odom on that important point. The court's refusal to allow the defense to make the incomplete picture complete was error.

Several cases illustrate the court's error:

In *Brunson v. State*, supra, the defendant was arrested for trafficking in cocaine following a stop and search. The entire incident was videotaped. On the tape, the

arresting officer asked the defendant if he had ever been arrested. The tape had no audible response. At trial, the tape was played and the jury was provided a transcript of what was said, including the unanswered question about the defendant's arrest history. On cross examination of the arresting officer, the defense sought to elicit evidence that the defendant had no prior arrest history, but was refused by the court. The First District held that the State had opened the door to the otherwise inadmissible evidence of the defendant's lack of arrest history when it played the tape of the officer's unanswered question, which created the mis-impression that the defendant had been previously arrested. Finding error in the trial court's refusal to give the defendant the opportunity to "qualify, explain or limit" the incomplete picture regarding the defendant's arrest history, the Court reversed the defendant's conviction.

In *Johnson v. State*, 653 So. 2d 1074 (Fla. 3rd DCA 1995), the state elicited the defendant's statement to a detective that the defendant had hit the victim with a stick. The trial court refused, however, to allow cross examination about a subsequent statement made by the defendant that the defendant had hit the victim only after the victim had first hit him. The Third District reversed the defendant's manslaughter conviction after finding that the State had opened the door to admission of the

defendant's related statement, which was necessary for the jury to accurately perceive the whole context of what had transpired.[34]

The court's restriction of the defendant's cross examination of Odom, which was necessary to clarify the misleading impression that the defendant had never told Odom about the threats against them and their family, was particularly harmful. The defendant claimed that he had given a false confession, in part, because he was motivated to protect his family after the police informed him of the threats. The defendant's communication of those threats to Odom, at or near the time of the confession, was key because it corroborated the defendant's claim. After the prosecution won a pre-trial ruling that the defendant's statements to Odom about the threats would not be admitted, the prosecution sought to mislead the jury about whether the defendant had ever warned Odom about the threats, by purposefully asking Odom questions about the defendant's failure to warn her at a time other than the time when the defendant had actually warned her. After the court refused to

[34] See also, *Docekal v. State*, 929 So. 2d 1139 (Fla. 5th DCA 2006), *Cullen v. State*, 920 So. 2d 1155 (Fla. 4th DCA 2006), *Stotler v. State*, 834 So. 2d 940 (Fla. 4th DCA 2003) and *Sweet v. State*, 693 So. 2d 644 (Fla. 4th DCA 1997), in which the courts reversed the defendant's convictions due to an improper restriction of cross examination, where the State had "opened the door" and a full cross examination was necessary and appropriate to clarify or correct a misleading impression left by the State's direct examination.

allow the defense to present a complete picture of what the defendant had said to Odom, the prosecution further capitalized on this misleading impression in closing argument:

> "So let's go on to what happened next. They're [the defendant and Odom] in that room, he does not warn her. Remember, he is claiming that he was motivated to do this because he was so afraid, so afraid for his family that they were going to be hurt and he talked, oh, they're in danger and danger was imminent and somebody was going to come after his family right away and this supposedly is what motivated him to enter this confession. He doesn't say a word to her. No warning. Don't run – nothing like, run for your life or go get my family and run for your life. Nothing." (T. 12641).

After the defense counsel's objection was overruled, the prosecutor continued:

> "In that room, Diane Odom told you that he did not warn her."

(T. 12642). Defense counsel again objected and moved for a mistrial arguing that the prosecutor was creating a false reality given the court's refusal to allow the defense to elicit the defendant's actual statements to Odom about the threats. (T. 12642). The court denied the defendant's motion. (T. 12647).

"A trial court reversibly errs by prohibiting cross examination 'when the facts sought to be elicited are germane to that witness' testimony and plausibly relevant to the theory of defense." *Docekal v. State*, supra at 1142, citing *Bertram v. State*, 637 So. 2d 258, 260 (Fla. 2d DCA 1994). Such an error occurred here. Under these circumstances, the State cannot prove beyond a reasonable doubt that the court's

restriction of the defendant's cross examination of Odom did not contribute to the verdict. *State v. DiGuilio*, 491 So. 2d 1129, 1135-36 (Fla. 1986).

IV

WHETHER THE TRIAL COURT ERRED IN ALLOWING THE DEFENDANT TO BE "IMPEACHED" WITH EVIDENCE OF COLLATERAL CRIMINAL CONDUCT, WHERE THE DEFENDANT HAD NOT OPENED THE DOOR TO THE ADMISSION OF THE EVIDENCE AND THE EVIDENCE WAS IRRELEVANT.

A. ERROR TO ADMIT EVIDENCE OF THE DEFENDANT'S PRIOR ARREST FOR CARRYING A CONCEALED FIREARM.

The defendant testified that he was told by the police that a .45 caliber handgun had been used in the murders. (T. 9538). Regarding guns, the defendant essentially said three things: he did not own one, he did not know how many rounds a .45 caliber handgun held and he used the term "hammer" to describe a gun "clip." (T. 9540, 9738-39).

Based upon the foregoing, the State claimed that the defendant's testimony "opened the door" to evidence that the defendant had been found guilty and received a withhold of adjudication on the charge of carrying a concealed firearm. (T. 9839-40). The defense argued that the defendant's denial of gun ownership and his lack of familiarity with a .45 caliber gun did not open the door to the arrest evidence. The defense maintained the evidence was relevant only to show criminal propensity and that the prejudice from its admission far outweighed its probative value. (T. 9912-13, 17-18). The court found the evidence was admissible. (T. 9920). In accordance with that ruling, the following exchange occurred between the State and the defendant:

Q. Mr. Calloway, isn't it true that on February 2, 1996, you were in possession of a firearm, a Taurus .38 caliber automatic?

Defense Counsel: Previously made objection.

Court: Overruled.

A. Correct.

Q. Isn't it true that the possession of that firearm resulted in a court case against you charging you with the criminal offense of carrying a concealed firearm, is that true, sir?

Defense Counsel: Same objection.

A. Correct.

(T. 9978).

"In order to properly open the door to such damaging impeachment evidence [collateral crimes evidence], the defendant or defense must offer misleading testimony or make a specific factual assertion which the state has the right to correct, so that the jury will not be misled." *Modeste v. State*, 760 So. 2d 1078, 1082 (Fla. 5th DCA 2000) and *Brown v. State*, 579 So. 2d 898 (Fla. 4th DCA 1991).

At trial, the defendant testified that he did not own a gun. He did not say that he never possessed one. The defendant did not profess to be ignorant about guns. He merely said that he did not know how many bullets were in a .45 caliber weapon and mistakenly referred to a "clip" as a "hammer." There was simply nothing misleading about the defendant's testimony regarding firearms that necessitated the

admission of evidence that three years before, the defendant was charged with carrying a concealed, .38 automatic. Since proof of the prior charge was not otherwise admissible to prove any material fact in issue, it was plainly error for the trial court to allow the defendant to be "impeached" by this irrelevant evidence.

In *Modeste v. State*, supra, during trial on charges of possession of cannabis and possession of drug paraphernalia, the defendant testified that when he was placed under arrest, the arresting officer informed him that he was being charged with possession of cannabis. The defendant claimed that he was unaware of the term, "cannabis," and did not know its meaning. On cross examination, over defense objections, the State elicited evidence that the defendant had twice previously been arrested for possession of cannabis. The Fifth District held that the defendant had not opened the door to admission of evidence of his prior arrests. The court reasoned that the defendant's direct testimony did not mislead the jury. The defendant did not say that he didn't know what marijuana was, that he had never possessed drugs or that he had never been arrested. The court concluded that admission of the collateral crimes evidence was probative only of the defendant's bad character and was harmful error. The court therefore reversed the defendant's conviction.

Similarly, in *Ousley v. State*, 763 So. 2d 1256 (Fla. 3rd DCA 2000), the defendant was charged with first degree murder. On direct examination, the defendant testified that he did not own a weapon on the day of the crime. The court

found that the defendant's testimony did not open the door to cross examination by the state, which led the defendant to say that he had never owned one, which then improperly resulted in his impeachment with two prior convictions involving weapon possession. The court found that the "impeachment" was harmful error that necessitated the reversal of the defendant's convictions.

Finally, in *Bozeman v. State*, 698 So. 2d 629 (Fla. 4th DCA 1997), the defendant was charged with battery on an officer after he allegedly struck a corrections officer. During the cross of the victim, defense counsel asked the officer if he was extra apprehensive when he entered the unit housing the defendant. On re-direct, the officer was permitted to explain that the unit housed the worst behaved inmates who had a propensity for violence. The Fourth District held that defense counsel's question concerning the officer's apprehension did not open the door to admission of references to the defendant's past bad acts or violent behavior. The court likewise found that the error required reversal of the defendant's conviction.

Nothing about the defendant's testimony here misled the jury on the issue of the defendant's use or knowledge of guns.[35] It was therefore improper to introduce evidence of the defendant's prior gun offense. The evidence of the prior gun offense

[35] The prosecutor claimed in closing argument that the defendant had lied about his knowledge of guns; as proof the prosecutor cited the fact that the defendant "was caught with a concealed .380 semi-automatic pistol." (T. 13016).

was also inadmissible because it was not otherwise relevant to any material fact. The erroneous admission of this collateral crime evidence is presumptively harmful because of the danger that the jury took evidence of the defendant's bad character or propensity to commit crime as evidence of guilt. *Czubak v. State*, 570 So. 2d 925, 928 (Fla. 1990) and *Jackson v. State*, 627 So. 2d 70, 71 (Fla. 5th DCA 1993). Reversal of the defendant's convictions is required.

B. ERROR TO ADMIT EVIDENCE OF THE DEFENDANT'S PLANNING AND PARTICIPATION IN A ROBBERY WITH GOSHA THROUGH FOUR DIFFERENT WITNESSES.

During his direct examination, the defendant claimed that Law told him that the people who murdered Gosha wanted to kill the defendant. (T. 9595-9604). The defendant testified that he then asked Law why they would want to kill him since "I ain't did nothing to nobody." (T. 9604). The defendant admitted that although he had done some things, he had gotten his life together. (T. 9606). Unlike Gosha, who apparently worked for a fast food restaurant, but had a car with an expensive paint job and rims, the defendant said he didn't own a car or fancy clothes. (T. 9608). The defendant stated that merely because he was friends with Gosha did not make him guilty of the things that Gosha did. (T. 9608, 9611). He denied hurting anyone or taking anything from anyone. (T. 9609).

Based upon the foregoing, the State claimed that the defendant opened the door to evidence of a robbery the defendant committed with Gosha. (T. 9832-34, 9862).

Over defense objections, the court ruled that the State could impeach the defendant with evidence of the defendant's role in the Gosha robbery. (T. 9933-35).

On cross examination, the prosecutor asked the defendant if he had planned a robbery with Gosha three days before Gosha's death. (T. 9983). The defendant denied the allegation. The defendant explained that he told Law that three days prior to Gosha's death, he was the victim of a robbery involving Gosha. (T. 9983-84).

On this record, it is clear that the defendant's alleged participation in a robbery with Gosha was a non-material collateral matter; it was not relevant to any fact in issue and the "impeaching facts" did not demonstrate the defendant's bias, corruption or lack of competency. Thus, when the defendant was cross examined on this non-material collateral matter, his answer should have been conclusive and not subject to impeachment through the contradictory testimony of another witness. See *Lawson v. State*, 651 So. 2d 713 (Fla. 2nd DCA 1995); *Dupont v. State*, 556 So. 2d 457 (Fla. 4th DCA 1990) and *Gelabert v. State*, 407 So. 2d 1007 (Fla. 5th DCA 1981). Despite these precedents, the court permitted the State to impeach the defendant with the testimony of four separate witnesses.

The prosecutor elicited from Detective Law and Detective Pereira that the defendant had admitted to planning a robbery with Gosha just a few days prior to Gosha's death. (T. 11033-36, 11108). The prosecutor went further with Pereira. In addition to eliciting testimony about the plan, Pereira provided details about how

the alleged robbery was committed. (T. 11108-09).

Not satisfied with the details of the robbery allegation, the prosecutor added an additional prejudicial element when questioning Ofshe:

> Q: Isn't it true that the defendant [Calloway] told you that Detective Law told him, that's Calloway, that Law tells Calloway you and Gosha planned a home invasion robbery *and it was because of that that Gosha was killed*?[36]

(T. 11224-25).

Finally, during the prosecutor's redirect examination of Dr. Welner, the prosecutor posed a hypothetical question which included references to the defendant being questioned about an unrelated homicide and volunteering information about a robbery planned with another person, which was the last time that person was seen alive.[37] (T. 12267).

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[36] The defendant objected to the remark and later moved for a mistrial. (T. 11224-25, 11233-34). At sidebar, the court, reminded the prosecutor that the evidence in issue had been admitted solely to impeach the defendant's testimony and noted that the State had brought up the evidence multiple times. (T. 11226, 11230). The court's observation buttressed the defense contention that the objectionable evidence was becoming a feature of the trial.

[37] Over defense objections, a fifth witness was called to testify about the "Twin" robbery. Detective William Hladky testified that the "Twin" robbery occurred on April 21, 1998. (T. 12365). Prior to Pereira's interview of the defendant, Hladky believed that the defendant was only a witness in the case. (T. 12372). Significantly, the "Twin" robbery was never brought to trial despite the passage of 12 years and the State's incentive to obtain a conviction that could be used as an aggravator in the present case. (T. 11102).

On each occasion, the defense objected to the improper references to collateral criminal activity and ultimately moved for a mistrial. The defense argued that any probative value had been far exceeded by the prejudice from the evidence, which had become a feature in the trial. (T. 11126, 11227). With the last reference, the defendant again moved for a mistrial and added that the prosecutor's question had violated a prior agreement limiting the permitted scope of any reference to Gosha.[38] (T. 12271). The court denied the motion. (T. 12272).

The prosecutor's repeated references to collateral criminal activity, made under the guise of impeachment of the defendant, were harmful error. In *Gonzalez v. State*, 538 So. 2d 1343 (Fla. 4th DCA 1989), the defendant was charged with three counts of sexual battery. The defense at trial was consent. During his testimony, the defendant claimed that he had sex only with his wife and the victim. On cross examination, over defense objection, the State elicited evidence that he had previously had sex with another victim, which formed the basis of a prior sex charge. Noting that the number of people with whom the defendant had sex was not in issue, the Court found that it was improper to impeach the defendant on that collateral matter and reversed the defendant's convictions.

[38] Prior to trial, the parties agreed that the State would not elicit any testimony regarding the possibility that the defendant was the last person to see Michael Gosha alive before Gosha's murder. (T. 2222-25).

Similarly, in *Foster v. State*, 869 So. 2d 743 (Fla. 2nd DCA 2004), the defendant was charged with leaving the scene of an accident with injury. During an interview with the police, the defendant said that he had been unable to stop prior to the accident due to defective brakes. The State impeached the defendant's testimony with the testimony of another officer, who opined that the defendant's brakes were functional. The Second District reversed the defendant's conviction because the impeachment of the defendant on a collateral matter may well have swayed the jury to find the defendant guilty for an improper reason. See also *O'Steen v. State*, 506 So. 2d 476 (Fla. 1st DCA 1987); *Gelabert*, *Lawson*, and *Dupont*, supra, for similar decisions.

Even if this Court should find that the defendant had "opened the door" to the admission of this prejudicial evidence, the defendant maintains that the limited relevance of establishing the defendant's "participation" in an irrelevant robbery that had not been brought to trial for 12 years, was far outweighed by the prejudice resulting from the State's repeated references to that robbery through four separate witnesses. See Section 90.403, Florida Statutes. The State enhanced the prejudice from that evidence by stating that because the defendant had participated in the robbery with Gosha, Gosha was killed. Under the circumstances of this case, the State's repeated references[39] to collateral criminal conduct constituted harmful

[39] In its closing argument, the State twice referenced the defendant's participation in the Gosha robbery. (T. 12591, 13016). On the first occasion,

error. *Czubak v. State*, supra; *Seavey v. State*, 8 So. 3d 1175 (Fla. 2nd DCA 2009).

V

THE TRIAL COURT ERRED IN PERMITTING THE STATE TO IMPEACH THE DEFENDANT THROUGH THE USE OF A STATEMENT MADE BY A NON-TESTIFYING CO-DEFENDANT, THEREBY DENYING THE DEFENDANT'S RIGHT TO CONFRONTATION UNDER THE SIXTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

In *Bruton v. United States*, 391 U.S. 123 (1968), the United States Supreme Court held that a defendant's rights under the Confrontation Clause of the Sixth Amendment were violated by the introduction of a non-testifying co-defendant's confession, which named and incriminated the defendant. See also *Looney v. State*, 803 So. 2d 656, 671 (Fla. 2001). In this case, the defendant's confrontation rights were violated when the trial court permitted the State to cross examine Richard Ofshe about statements allegedly made by co-defendant Clark about the crime charged, which were at odds with statements made by the defendant.

During his direct examination, the defendant spoke at length about his confession. Regarding the part where he said that he sent Clark to the store to buy duct tape and to ask Frank for instructions about what to do with the victims, the

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given the context, the jury may well have relied upon the Gosha robbery as substantive evidence and not as evidence that was supposedly admitted for the limited purpose of impeaching the defendant.

defendant testified that he did not remember whether he made that part up or was told to say it by the police. (T. 9717, 9720, 9736).

Based upon that testimony, the State argued that the defendant had opened the door to admission of Clark's statements to the police, which indicated that the defendant had sent Clark for tape and to Frank for instructions. (T. 9865-66). The State wanted to show that the defendant could not have made up those facts because Clark had said the same thing. (T. 9867). In response, defense counsel accurately informed the court that the defendant had not said that he made those statements up; instead, he said that he could not recall if he had. (T. 9881-82). Also, the defense argued that the use of Clark's statement would violate the defendant's confrontation rights, since he could not confront Clark about his statements. (T. 9868-70). Finally, the defense noted that the "statements" the State intended to use were proffered by Clark's attorney and were not actually made by Clark. (T. 10545-47, 10605). The court ruled that it would allow the impeachment. (T. 9884, 9927-28, 10606).

On cross examination, the State was content to have the defendant concede that he had told Ofshe[40] that he made up the portions of his confession that concerned

[40] The defendant was referencing Ofshe's interview with the defendant that Ofshe used as part of his source material for his opinion in this case. (T. 10338-39).

sending Clark to get duct tape and to ask instructions from Frank. (T. 10050, 10055, 10064).

However, in its cross of Ofshe, the State went further. After Ofshe testified that the defendant had told him that he made up the part of his confession concerning sending Clark to Frank for orders about who to kill, the prosecutor then asked:

> Q: Isn't that in conflict, Dr. Ofshe, with what you knew at the time, that being that Clark?
>
> Defense Counsel: Objection, confrontation.
>
> Court: Overruled.
>
> Q: Had also said the same thing, that people had gone out to Frank's for orders, isn't that true, sir?
>
> A: I don't know.

(T. 10888-89). After the prosecutor made other references to Clark's "statements," Ofshe testified that he was aware of them because he discussed them with the defendant. (T. 10889-90, 10892). Ofshe acknowledged that it was inconceivable that the defendant could make up something that Clark had also said.[41] (T. 10892-93). Over defense objection, the prosecutor also elicited that the same conflict

[41] Ofshe was not able to tell if the defendant had lied about the two statements or had a memory error. (T. 10895-900).

existed between the defendant's claim that he made up the part about sending Clark for duct tape and Clark's statement. (T. 10894-95).

Nothing in the defendant's testimony opened the door to admission of Clark's statements implicating the defendant. This Court has said that the inquiry regarding whether a witness has "opened the door" to the admission of clearly inadmissible and unreliable statements must involve considerations of "fairness" or the need to "present a complete picture." *Ramirez v. State*, 739 So. 2d 568, 580 (Fla. 1999). In this case, the answer to the inquiry must be that it was error for the court to permit the State to cross examine Ofshe using accusatory statements made by Clark, which the defendant did not have an opportunity to confront. The defendant had merely testified that he could not recall whether he had made up the portions of his statement in issue, or had been given the substance of the statements by the police. He was later reminded by the State on cross that he previously told Ofshe that he had made the statements up. Having "impeached" the defendant on the point, the State could ask the jury to consider the impeachment in assessing the defendant's credibility.

However, no notions of "fairness" could allow the State to use the defendant's prior statement to Ofshe, which had been admitted solely for impeachment purposes, to then justify the admission of Clark's inadmissible and highly prejudicial

statements. And, there can be little question that Clark's alleged statements[42] to the police about the defendant's role in sending him for tape and to Frank were inadmissible hearsay. *Bruton v. United States*, supra, and *Lee v. Illinois*, 476 U. S. 530 (1986). In fact, the *Lee* court noted that given the strong motivation to implicate another, a co-defendant's incriminating statements are especially suspect and are deemed even less credible than ordinary hearsay. *Lee*, supra at 541.

The erroneous use of Clark's alleged statements was particularly harmful given that the central issue in this case was the legitimacy of the defendant's confession. The State improperly used Clark's statements to undercut the defendant's credibility regarding his interrogation and confession and to diminish the testimony of his expert, Richard Ofshe. On this record, the State cannot prove beyond a reasonable doubt that the use of the co-defendant's statements did not contribute to the verdict. Reversal of the defendant's convictions is required. *Pacheco v. State*, 698 So. 2d 593 (Fla. 2nd DCA 1997) and *Jones v. State*, 739 So. 2d 1220 (Fla. 1st DCA 1999).

VI

THE TRIAL COURT ERRED IN PERMITTING TWO POLICE WITNESSES TO GIVE OPINION TESTIMONY CONCERNING

[42] The prosecutor never responded to defense counsel's assertion that the statements were not Clark's, but were, in fact, a proffer made by Clark's lawyer.

THE CAPABILITY OR WORK QUALITY OF OTHER POLICE WITNESSES, THEREBY IMPROPERLY BOLSTERING THE CREDIBILITY OF THOSE WITNESSES AND INVADING THE PROVINCE OF THE JURY TO THE DETRIMENT OF THE DEFENDANT'S RIGHT TO A FAIR TRIAL.

In *Boatwright v. State*, 452 So. 2d 666, 668, (Fla. 4th DCA 1984), the Court aptly noted:

> "It is elemental in our system of jurisprudence that the jury is the sole arbiter of the credibility of witnesses. (Citing *Barnes v. State*, 93 So. 2d 863 (Fla. 1957). Thus, it is an invasion of the jury's exclusive province for one witness to offer his personal view on the credibility of a fellow witness."

In this case, the State twice violated that fundamental principal. The prejudice to the defendant resulting from that harmful testimony denied the defendant a fair trial.

The central issue at trial concerned the legitimacy and reliability of the defendant's "confession." After 18 hours of intermittent interrogation, Detectives Law and Everett claimed that the defendant confessed his involvement in the five murders charged in this case. The defendant maintained that the confession was false and that the facts contained within the confession came from the detectives or had been made up by him, after the police lied to the defendant about the evidence against him and a threat against the defendant and his family. As a consequence, the credibility of the three main witnesses to the events in the interrogation room was of crucial significance.

Against that backdrop, the prosecutor, during his re-direct examination of Detective Cooper, Everett's supervisor, engaged in the following exchange with Cooper:

> Q. Was Sergeant Everett at that time a capable police detective?
>
> Mr. Smith [defense counsel]: Objection. Calls for an opinion.
>
> Mr. Headley [the prosecutor]: As a supervisor, your Honor.
>
> The Court: Overruled
>
> A. Absolutely.
>
> Mr. Smith: Character evidence of the witness bolstering.
>
> The Court: Overruled. It's something that is of her knowledge.
>
> A. Yes. Sergeant Everett was a capable supervisor and Sergeant Everett used his discretion.

(T. 8177).

Apparently emboldened by the court's ruling permitting this type of opinion testimony, the prosecutor later sought the opinion of Rupert Butcher, a fingerprint examiner, regarding the work done by Fabrice Nelson, the lead crime scene technician in this case. The prosecutor asked Butcher:

> Q: Didn't Fabrice Nelson do an excellent job of collecting and preserving evidence from this scene as we can see it in State's Exhibit 28.
>
> Defense: Objection. He has no way of knowing. He was not there. Calls for improper opinion.
>
> Court: You can answer, sir, if you know.

A: Again, well I wasn't there to know exactly, but based on the gravity or amount of evidence that he actually collected and processed, I would say that he did a very good job of processing the evidence.

(T. 11523-24).

Clearly, the prosecutors' questions were purposefully designed to have Detective Cooper and Examiner Butcher provide opinions regarding the capability and quality of work done by two key police witnesses; Everett and Nelson. Particularly with regard to Everett, Cooper's testimony was designed to provide the jury assurances that Everett had handled his job (and in turn, the interrogation of the defendant) appropriately. In doing so, the prosecutor improperly sought to have Cooper and Butcher invade the exclusive fact-finding province of the jury by bolstering the testimony of another witness. Several cases illustrate the point.

In *Page v. State*, 733 So. 2d 1079 (Fla. 4th DCA 1999), after the defense attacked the credibility of the informant who had allegedly engaged in a drug transaction with the defendant, the supervising detective was improperly permitted to testify that the informant had always been trustworthy and reliable. The court reversed the defendant's conviction due to the officer's testimony and noted that such improper bolstering from a police officer is particularly harmful due to the great weight given an officer's testimony by the jury.

In *Yi v. State*, 128 So. 3d 186 (Fla. 5th DCA 2013), in a prosecution for lewd

and lascivious molestation, the lead detective testified regarding his experience in interviewing victims of sex crimes. The detective stated that although there were instances where a victim's story was inconsistent with his investigation, there were no such red flags in the present case. The Fifth District held that the officers' testimony was an improper expression of his opinion concerning the credibility of the victim and reversed the defendant's conviction. The Court agreed with the *Page* court that such testimony from a police officer is particularly harmful.

In *Lee v. State*, 873 So. 2d 582 (Fla. 3rd DCA 2004), the Third District reversed the defendant's conviction for robbery after the lead detective opined that he thought the victim was a credible witness. The court found that the detective's testimony improperly bolstered the credibility of the victim and denied the defendant a fair trial.

In *Olsen v. State*, 778 So. 2d 422 (Fla. 5th DCA 2001), after the defense attacked the credibility of the store manager/victim's version of the facts, the State improperly elicited the investigating officer's testimony that she believed the manager's version of the facts. The court found that the officer's testimony constituted improper bolstering of the manager's testimony and reversed the defendant's armed robbery conviction.[43]

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[43] See also, *Johnson v. State*, 682 So. 2d 215 (Fla. 5th DCA 1996); *Williams v. State*, 619 So. 2d 1044 (Fla. 4th DCA 1993); and *Hernandez v. State*, 575 So. 2d 1321 (Fla. 4th DCA 1991), where the courts reversed convictions due to testimony from a state witness which improperly bolstered the testimony of another state

In the instant case, the defendant's defense was centered upon establishing that the State's main proof of the crimes charged, his confession, was false. As a consequence, the credibility of the interrogating police officers and the quality of the police work in this case were of primary significance. In two separate instances, the prosecutor improperly sought to bolster the credibility of two key police investigators by asking two other officers their opinions regarding the capability and work done by the two investigators. One of the investigators who was the subject of the questions, Sergeant Everett, had claimed that he had received the defendant's confession. The answers to the prosecutors' questions plainly informed the jury that in the opinion of their police colleagues, Everett and Nelson were capable and had performed their jobs well. In doing so, the State improperly used Detective Cooper and Examiner Butcher to bolster the credibility of Everett and Nelson on issues significant to the defendant's defense. As in the cases cited above, the prejudice to the defendant resulting from such improper bolstering should compel this Court to order a new trial.

VII

THE TRIAL COURT ERRED IN OVERRULING THE DEFENSE'S OBJECTION TO THE PROSECUTOR'S CLOSING ARGUMENT WHICH SHIFTED THE BURDEN OF PROOF TO THE DEFENDANT AND DIMINISHED THE REASONABLE

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witness.

DOUBT STANDARD.

At the start of her rebuttal argument, the prosecutor sought to redefine the State's burden of proof in this case:

> "*We know exactly what this case comes down to.* We have known this all along. Absolutely nothing. Nothing, nothing has changed. *We are still here with the situation of do you believe all the evidence in this case of the officers and civilians alike each one of them which supports the other or do you believe his [the defendant] story*?"

(T. 13008). The defense objected to the comment and the court overruled, instructing the jury to rely on their recollection of the evidence. (T. 13008). The court erred in permitting the prosecutor's clearly improper argument which misinformed the jury concerning the appropriate burden of proof in this case.[44]

In *Gore v. State*, 719 So. 2d 1197, 1200 (Fla. 1998), this Court commented:

> "The standard for a criminal conviction is not which side is more believable, but whether, taking all the evidence into consideration, the State has proven every essential element of the crime beyond a reasonable doubt. For that reason, it is error for a prosecutor to make statements that shift the burden of proof and invite the jury to convict the defendant for some reason other than that the State has proved its case beyond a reasonable doubt."

In *Gore*, the prosecutor remarked:

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[44] The Court reviews error in overruling defense objections to improper argument for abuse of discretion. *Brooks v. State*, 762 So. 2d 879 (Fla. 2000).

> "If you believe he [the defendant] did not tell you the truth, that he made up a story, that's it, he's guilty of first degree murder.....It's simple and it comes down to this in simplicity: If you believe his story, he's not guilty. If you believe he's lying to you, he's guilty. It's that simple."

Applying the foregoing standard, this Court reversed the defendant's murder conviction, finding that the prosecutor's argument was plainly improper because it encouraged the jury to reach its verdict based upon the credibility of the defendant and not on its application of the reasonable doubt standard.

Similarly, in *Mitchell v. State*, 118 So. 3d 295 (Fla. 3rd DCA 2013), the court reversed the defendant's conviction due to several improper remarks by the prosecutor in closing argument, all of which had one basic theme - to acquit the defendant, the jury would have to believe the defendant and find that all of the state's witnesses were liars. The court found that the prosecutor's remarks improperly shifted the burden of proof.

See also *Sempier v. State*, 907 So. 2d 1277, 1278 (Fla. 5th DCA 2005)(Reversal based on improper argument - "*It's whether or not you truly believe everything the defendant says. When you look at all of the testimony in this case, there may be conflicts, but the bottom line is, if you believe her testimony, that's all you need.")*; *Freeman v. State*, 717 So. 2d 105, 106 (Fla. 5th DCA 1998)(Reversal based on improper argument - prosecutor told jurors that if they believed the police officers instead of the defendant, then they should find the defendant guilty and that "the

question" was who they wanted to believe); *Northard v. State*, 675 So. 2d 652, 653 (Fla. 4th DCA 1996)(Reversal based on improper argument - "*If you believe the defendant's events the police cannot possibly be telling you the truth, and you've got to decide if that's what they did....in order to find him not guilty you're going to have to believe that the defendant was telling the truth and the officer was lying*..."); and *Clewis v. State*, 605 So. 2d 974 (Fla. 3rd DCA 1992)(Reversal based on improper argument - "*You have to believe his story over the story of those police officers that saw him that night to have reasonable doubt. You must believe that you must disbelieve the testimony of those police officers*-").

In this case, rather than assume the proper burden of proving this case beyond a reasonable doubt, the prosecutor encouraged the jury to resolve the case along a different line - if they believed the State's witnesses rather than the defendant, they could resolve the case in favor of the State. The prosecutor's argument was clearly improper because it diminished the State's burden and shifted the burden to the defendant. *Gore v. State*, supra. The prosecutor's argument was particularly harmful in this case. Key to the prosecutor's case was the legitimacy of the defendant's confession. The credibility of the witnesses who spoke to the issue, particularly Everett, Law and the defendant, was clearly something for the jury to resolve. But, the jury should not have been told that their verdict should rest on their resolution of that issue, rather than on a finding that the State's case had been proven beyond a

reasonable doubt. Under those circumstances, the State cannot prove beyond a reasonable doubt that the prosecutor's improper remark did not contribute to the verdict. *State v. DiGuilio*, supra.

VIII

THE TRIAL COURT ERRED IN ALLOWING A SUBSTITUTE MEDICAL EXAMINER TO TESTIFY CONCERNING THE FINDINGS CONTAINED IN AUTOPSY REPORTS PREPARED BY A NON-TESTIFYING MEDICAL EXAMINER, WHEN THERE WAS NO EVIDENCE THAT THE ORIGINAL MEDICAL EXAMINER WAS UNAVAILABLE, IN VIOLATION OF THE CONFRONTATION CLAUSE OF THE U.S. CONSTITUTION.

At trial, over repeated defense objections, the State was allowed to elicit testimony from Dr. Bruce Hyma, a substitute medical examiner, concerning findings made by a different medical examiner, Dr. Siebert, who attended the crime scene and performed five autopsies, but did not testify at the trial. Since the forensic analysis conducted by Dr. Siebert constituted testimonial evidence, there was no showing that Dr. Siebert was unavailable for trial and the defendant did not have a prior opportunity to cross-examine Dr. Siebert, it was error for the trial court to allow Dr. Hyma to testify concerning Dr. Siebert's findings and observations.[45]

The Confrontation Clause of the Sixth Amendment bars admission of

[45]The standard of review on the admission of evidence is abuse of discretion as limited by the rules of evidence. *Hudson v. State*, 992 So.2d 96, 107 (Fla. 2008).

testimonial evidence, unless the declarant is unavailable to testify and the accused has had a prior opportunity to cross-examine the declarant. *Crawford v. Washington*, 541 U.S. 36, 68 (2004). In *Melendez–Diaz v. Massachusetts*, 129 S. Ct. 2527, 2532 (2009), the Supreme Court determined that forensic analyses, including autopsy examinations, qualify as "testimonial" statements, and that forensic analysts are "witnesses" to which the Confrontation Clause applies. Therefore, when the State seeks to introduce forensic analyses, "[a]bsent a showing that the analysts [are] unavailable to testify at trial and that petitioner had a prior opportunity to cross-examine them," a defendant has the right to "'be confronted with'" the analysts at trial under *Crawford*. *Id*. See also *Bullcoming v. New Mexico*, 131 S. Ct. 2705 (2011), in which the Court specifically rejected the use of "surrogate testimony," when the surrogate was not actually involved in the preparation of the forensic evidence.

In *United States v. Ignasiak*, 667 F. 3d 1217 (11th Cir. 2012), the Eleventh Circuit analyzed the statutory framework under which Florida's medical examiners operate and expressly held that autopsy reports are clearly testimonial and are therefore subject to the requirements of the confrontation clause. In *Ignasiak*, the Court reversed the defendant's convictions after finding that it was error to permit a surrogate medical examiner to testify about the findings made by an absent medical examiner, without a showing that the absent examiner was unavailable and the

defendant had a prior opportunity to cross examine the absent examiner.

In this case, the substitute medical examiner, Dr. Hyma, testified that Dr. Siebert attended the crime scene, took photographs, made diagrams and sketches and provided a narrative description of his findings during the autopsies done on the five shooting victims. (T. 9114-23). Dr. Hyma stated that he relied upon Dr. Siebert's written documentation for his testimony. (T. 9195). In fact, nearly all of Dr. Hyma's testimony consisted of his relation of the findings made by Dr. Siebert, save for his conclusions regarding the cause of death and his opinions concerning whether the victims suffered an immediate and painless death. (T. 9124-67).

The admission of the findings contained in the report and documentation prepared by Dr. Siebert through the testimony of Dr. Hyma violated the defendant's constitutional right to confront the witnesses against him. Dr. Siebert's report and documentation are part of a forensic analysis which qualifies as a testimonial statement, and as a forensic analyst, Dr. Siebert was a witness to which the Confrontation Clause applies. The report and supporting material were also prepared in anticipation of trial and designed to establish cause of death, which is an element of the crime of homicide. See *State v. Johnson*, 982 So. 2d 672 (Fla. 2008).

Additionally, there was absolutely no evidence to indicate that Dr. Siebert was unavailable. In fact, when the defense twice maintained that there was no showing that Dr. Siebert was unavailable, the State did not contest that assertion. (T. 794,

9087). The prosecutor simply said that she preferred not to call Dr. Siebert as a witness.[46] (T. 799, 9090).

In *State v. Johnson*, supra, this Court held that it was error to have permitted the supervisor of a FDLE lab analyst to testify about the absent analyst's findings, when there was no showing that the analyst was unavailable for trial.

Similarly, in this case, it was plainly error for the trial court to have allowed Dr. Hyma to testify about Dr. Siebert's findings, when it was clear that there was no evidence to support the notion that Dr. Siebert was unavailable. Rather, the State did not call Dr. Siebert as a matter of strategy.

The court's error in admitting the contents of Dr. Siebert's autopsy report through the testimony of Dr. Hyma was not harmless. The corpus delicti of a homicide must be proved beyond a reasonable doubt. Generally, the State establishes that a homicide occurred through the criminal agency of another by proving the cause of death. As the improperly admitted testimony of Dr. Hyma was the only evidence presented at the trial in this case concerning the cause of death, the erroneous admission of that testimony requires reversal of the defendant's murder

[46] The prosecutor's decision was undoubtedly motivated by the desire to avoid having the jury hear several disturbing facts regarding the quality of Dr. Siebert's work. Defense counsel proffered that Dr. Siebert had been fired from his job by the governor due to numerous errors made by Siebert. Siebert was found to have made mistakes or been negligent in approximately 40 of nearly 700 autopsies performed. (T. 9238-40).

convictions.

IX

IN PRECLUDING DEFENSE COUNSEL FROM ARGUING THAT THE STATE HAD FAILED TO PROVE THE AGGRAVATING CIRCUMSTANCES BEYOND A REASONABLE DOUBT, THE COURT IMPROPERLY RESTRICTED DEFENSE COUNSEL'S CLOSING ARGUMENT AND DENIED THE DEFENDANT A FULL AND FAIR SENTENCING HEARING.

"The proper exercise of closing argument is to review the evidence and to explicate those inferences which may reasonably be drawn from the evidence." *Gonzalez v. State*, 990 So. 2d 1017, 1028-29 (Fla. 2008) and *Bertolotti v. State*, 476 So. 2d 130, 134 (Fla. 1985). "The courts of this state allow attorneys wide latitude to argue to the jury during closing argument. (Citations omitted). Logical inferences may be drawn, and counsel is allowed to advance all legitimate arguments."[47] *Thomas v. State*, 748 So. 2d 970, 984 (Fla. 1999).

In the penalty phase of a capital case, the State has the burden of establishing the aggravating circumstances beyond a reasonable doubt. *Gonzalez v. State*, supra. Although the defendant may not re-litigate the guilt determination through the introduction of evidence or the presentation of arguments suggesting lingering doubt,

[47] A trial court has discretion in controlling closing arguments and its decision will not be overturned absent an abuse of discretion. *Merck v. State*, 975 So. 2d 1054 (Fla. 2007).

defense counsel is entitled to question the evidence presented by the State to establish aggravating factors. *Braddy v. State*, 111 So. 3d 810, 854 (Fla. 2012) and *Way v. State*, 760 So. 2d 903 (Fla. 2000).

In this case, defense counsel made no effort to relitigate the defendant's guilt in his closing argument. Instead, he endeavored to argue that the evidence introduced was insufficient to prove certain aggravating factors beyond a reasonable doubt, such as CCP and HAC, by arguing to the jury that the only evidence supporting the factor, the defendant's confession, was uncorroborated on certain important points. (T. 14194, 14201, 14206). Specifically, defense counsel tried to point out to the jury that the only evidence demonstrating the length of time the defendant was in the apartment and the order in which the fatal shots were fired came from the defendant's confession and no place else. The court, however, refused to allow the defense to make the argument because it disagreed with defense counsel's view of the evidence and because the issues had already been resolved by the jury when it found the defendant guilty. (T. 14203-206). The court's restriction of the defense closing argument rendered the penalty phase fundamentally unfair.

In finding the defendant guilty of first degree murder, the jury did not determine that the defendant had acted in a manner that was heinous, atrocious and cruel or in a cold, calculated and premeditated fashion. Those factors are plainly not elements of first degree murder, but are aggravators to be determined as part of the

weighing process mandated by Florida law. In his closing, defense counsel did not argue that the State's evidence was insufficient to sustain a recommendation of death because of lingering questions about the defendant's guilt of the crimes charged. Instead, defense counsel confined his argument to the sufficiency and weight of the evidence to establish the aggravating circumstances advanced by the prosecution in its closing argument. That is precisely the expected role of defense counsel that fundamental fairness, due process and the Eighth Amendment anticipates. See *Way v. State*, supra.[48] And, the fact that the trial court may have held a different view as to the sufficiency or weight of the evidence to support the aggravating circumstances was not a basis to prevent the defense from arguing its view of the evidence and inferences to be drawn from that evidence to the jury. The court's limitation of those arguments usurped the jury's role and prevented the defendant from receiving the full and fair sentencing hearing anticipated by the Eighth Amendment to the U.S. Constitution. The defendant's death sentence must therefore be reversed and this cause remanded for a new sentencing hearing.

X

THE TRIAL COURT IMPROPERLY LIMITED THE DEFENDANT'S ADMISSION OF MITIGATION EVIDENCE IN

[48] In *Way*, this Court found no abuse of discretion in allowing the defense to elicit evidence that a fire had not been set intentionally, which was relevant to the "murder in the course of a felony" aggravator.

THE PENALTY PHASE WHEN IT REFUSED TO ADMIT THE DEFENDANT'S FATHER'S MEDICAL RECORDS, WHICH DEMONSTRATED THAT THE FATHER HAD BEEN DIAGNOSED WITH SCHIZOPHRENIA AND POST-TRAUMATIC STRESS DISORDER, DIAGNOSES THAT WERE RELEVANT TO THE JURY'S FULL UNDERSTANDING OF THE DEFENDANT'S ABUSIVE CHILDHOOD, IN VIOLATION OF THE EIGHTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

The indispensable prerequisite to a reasoned determination of whether a defendant shall live or die is accurate information about a defendant and the crime committed. *Gregg v. Georgia*, 428 U. S. 153, 190 (1976). The defendant's penalty phase was diverted from that principle when the defendant was denied the opportunity to present relevant mitigation evidence to the jury regarding the defendant's troubled childhood.

The Eighth Amendment forbids exclusion of mitigation at capital sentencing. *Lockett v. Ohio*, 438 U.S. 586 (1978); *Eddings v. Oklahoma*, 455 U.S. 104 (1982) and *Hitchcock v. State*, 755 So. 2d 638 (Fla. 2000). In fact, the Eighth and Fourteenth Amendments require that "the sentencer not be precluded from considering as any mitigating factor any aspect of the record..." *Lockett*, supra at 604.

During the penalty phase, the defense called the defendant's mother, Shirley Hill, who testified about the abusive living conditions in which Hill and the defendant lived during the defendant's youth in Georgia. The abusive conditions were created

by the defendant's birth father, Solomon. The defendant frequently witnessed Solomon beating Hill, including one incident when Solomon tried to drown Hill in the bathtub. (T. 13871-76, 13880-81). During another incident, the defendant handed Hill a bat to use in defending herself against Solomon. (T. 13894-95). Solomon also beat the defendant with a "switch." (T. 13877).

To corroborate Hill's account of Solomon's violent behavior, the defense sought to introduce Solomon's medical records from the Veteran's Administration (VA). Those records indicated that Solomon suffered from schizophrenia and post-traumatic stress disorder, the latter from Solomon's service in Vietnam. (T. 13565-67, 13571-72, 13575, 13577). Although the diagnosis was made after the defendant and his mother had moved away from Solomon, defense counsel maintained that Solomon's illness contributed to the father's violent behavior, which in turn, had an adverse impact on the defendant's childhood. (T. 13578-80, 13586-87). The court refused to admit the records holding that the reason for Solomon's behavior was not relevant and that there was an insufficient nexus between Solomon's illness and his abusive behavior. (T. 13888). The court's ruling was plainly incorrect.

In *Tennard v. Dretke*, 124 S. Ct. 2562, 2570 (2004), the United States Supreme Court detailed the threshold for relevance of mitigating evidence in a penalty phase:

> We established that the 'meaning of relevance is no different in the context of mitigating evidence introduced in a capital sentencing proceeding' than in any other context, and thus the general evidentiary

> standard–'any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence'–applied.
> We quoted approvingly from a dissenting opinion in the state court: 'Relevant mitigating evidence is evidence which tends logically to prove or disprove some fact or circumstance which a fact-finder could reasonably deem to have mitigating value.' Thus, a State cannot bar 'the consideration of ....evidence if the sentencer could reasonably find that it warrants a sentence of less than death.'
> Once this *low threshold for relevance* is met, the 'Eighth Amendment requires that the jury be able to consider and give effect to' a capital defendant's mitigating evidence. (Citations omitted)(emphasis added).

There is little question that evidence of a defendant's abusive childhood constitutes compelling mitigation evidence. Eddings v. Oklahoma, supra; *Porter v. McCollum*, 558 U.S. 30 (2009); *Nibert v. State*, 574 So. 2d 1059 (Fla. 1990) and *Elledge v. State*, 613 So. 2d 434 (Fla. 1993). In this case, testimony regarding the defendant's abusive childhood was provided by the defendant's mother, Shirley Hill. However, given Hill's significant drug habit and blatant disregard for the welfare of her children, the jury may have had reason to question the credibility of Hill's account of the disturbing events during the defendant's youth. That is why Solomon's VA medical records and his diagnosis as a schizophrenic suffering from post-traumatic stress disorder was important mitigation. The diagnosis[49] and records could have

[49] In footnote 4 of *Porter v. McCollum*, supra, the Supreme Court noted that PTSD is not uncommon among veterans returning from combat. As such, the illness and its debilitating effects and consequences have received greater media attention, thereby likely increasing the juror's recognition and awareness.

corroborated Hill's account and given color and context for the jury regarding the violent conditions in which the defendant grew up. The exclusion of the records and the evidence demonstrating Solomon's mental illness constituted a clear violation of the defendant's Eighth Amendment right to present mitigation evidence to the jury. Given the slim margin by which the jury recommended death in this case, 7-5,[50] the unconstitutional restriction of mitigating evidence constituted harmful error compelling a reversal of the defendant's death sentence.

XI

FLORIDA'S CAPITAL SENTENCING SCHEME IS UNCONSTITUTIONAL BECAUSE IT PERMITS IMPOSITION OF A DEATH SENTENCE WITHOUT FIRST REQUIRING THAT THE JURY UNANIMOUSLY FIND THE EXISTENCE OF SUFFICIENT AGGRAVATING CIRCUMSTANCES BEYOND A REASONABLE DOUBT, IN VIOLATION OF THE DEFENDANT'S RIGHT TO TRIAL BY JURY IN BOTH THE FLORIDA AND UNITED STATES CONSTITUTIONS.

Only Florida and Delaware would execute Tavares Calloway on the verdict of a bare 7 to 5 majority. Florida is the only state which permits a death sentence based on a non-unanimous recommendation as to both the existence of aggravators and the recommendation of death. *Steele v. State*, 921 So. 2d 538, 548-50 (Fla. 2005). In fact, the Supreme Court of the United States has never approved a non-unanimous

[50] The court implied that if the jury returned a life recommendation, the court would have imposed a life sentence. (T. 13291).

verdict in a capital case. The furthest it has gone is to approve, in a non-capital case, the use of a verdict of a "substantial majority of the jury." *Johnson v. Louisiana*, 406 U. S. 356, 362 (1972); *see also Apodaca v. Oregon*, 406 U.S. 404 (1972). Florida's present outdated status is at odds with the notion that a bare majority in a capital case could satisfy *Johnson* and *Apodaca*. The "near-uniform judgment of the Nation provides a useful guide in delineating the line between those jury practices that are constitutionally permissible and those that are not." *Burch v. Louisiana*, 441 U.S. 130, 138 (1979) (non-unanimous six-person juries unconstitutional). The bare-majority verdict violates the Sixth, Eighth and Fourteenth Amendments to the United States Constitution. *But see Robards v. State*, 112 So. 3d 1256, 1267 (Fla. 2013) (7-5 death recommendation not unconstitutional).

In Florida, capital murder is the only crime for which Florida will increase a defendant's maximum sentence without a unanimous verdict. See, e.g., *Behl v. State*, 898 So. 2d 217 (Fla. 2d DCA 2005). Florida's "inviolate" right to trial by jury includes the right to a unanimous jury. Art. I, §22, Fla. Const.; see *Jones v. State*, 92 So. 2d 261 (Fla. 1956)(verdict of a Florida jury must be unanimous). A death sentence based upon a 7-5 majority independently violates Article I, Sections 9, 16, 17 and 22 of the Florida Constitution. *But see Robards*, supra.

The judicial fact-finding required by Section 921.141 violates the Sixth and Fourteenth Amendments as interpreted by *Apprendi v. New Jersey*, 120 S. Ct. 2348

(2000), and *Ring v. Arizona*, 536 U. S. 584, 589 (2002). In a non-capital case context, the United States Supreme Court held that any fact that increases the penalty for a crime beyond the statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt. Under *Apprendi* and *Ring*, "the relevant 'statutory maximum' is not the maximum sentence a judge may impose after finding additional facts, but the maximum he may impose *without* any additional findings." *Blakely v. Washington*, 542 U.S. 296, 303-04 (2004) (emphasis in the original). Moreover:

> [B]road discretion to decide what facts may support an enhanced sentence, or to determine whether an enhanced sentence is warranted in any particular case, does not shield a sentencing system from the force of our decisions. *If the jury's verdict alone does not authorize the sentence, if, instead, the judge must find an additional fact to impose the longer term, the Sixth Amendment requirement is not satisfied.*

Cunningham v. California, 549 U.S. 270, 127 S.Ct. 856, 869 (2006).

In the case at bar, the defendant filed a series of dismissal motions that challenged the constitutionality of Florida's capital sentencing scheme. (R. 1687-95, 2387-2421). These motions noted that any death sentence imposed in this case would be based upon aggravating circumstances that were never pled or specifically found beyond a reasonable doubt by a jury. Moreover, the jury recommendation in this case was not unanimous. Instead, the defendant's sentence is solely the product

of judicial fact-finding.[51] There can be no doubt that Tavares Calloway's death sentence violates the Sixth and Fourteenth Amendments as interpreted by *Apprendi*, *Ring*, *Blakely* and *Cunningham*.

CONCLUSION

For the foregoing reasons, the defendant's convictions must be reversed and the case remanded for a new trial. Alternatively, the defendant's sentence of death must be vacated and the case remanded for new sentencing proceeding before a jury.

Respectfully Submitted,

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[51] As required by Florida law. Section 921.141(3), Florida Statutes.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Appellant's Brief was forwarded by e-mail to Sandra S. Jaggard, Esq., the Attorney General's Office, 444 Brickell Avenue, Suite 650, Miami, Florida 33131, capapp@myfloridalegal.com, sandra.jaggard@myfloridalegal.com, this _____ day of May, 2014.

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CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this brief is composed in 14 point Times New Roman type.

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