IN THE SUPREME COURT
STATE OF FLORIDA
500 South Duval Street
Tallahassee, Florida 32399-1927

JASON ANDREW SIMPSON

Appellant,

v.

STATE OF FLORIDA,

Appellee.
_____/

Appeal No.: **SC07-798**
L.T. Court No.: 02-CF-11026

APPELLANT'S INITIAL BRIEF ON DIRECT APPEAL, PURSUANT TO FLA. R. APP. PRO. RULE 9.140(1)(a)

On Appeal from the Circuit Court, Fourth Judicial Circuit, and For Duval County, Florida

Honorable Charles W. Arnold
Judge of the Circuit Court, Division H

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PRELIMINARY STATEMENT

Appellant, JASON SIMPSON, will be referred to as "Appellant." The State of Florida will be referred to as "Appellee." Attorneys Frank J. Tassone and Rick A. Sichta, who are representing Appellant in this matter, will be referred to as the "undersigned counsel." Counsel at the time of trial will be referred to as either "Mr. Eler" or "Mr. Fletcher".

References to the Record on Appeal will be designated "ROA," followed by the page number indicated on the Index to the Record on Appeal. Citations to the trial transcripts will be designated "ROA" followed by a page citation.

STATEMENTS OF THE CASE AND FACTS

Procedural History

Jason Andrew Simpson was indicted for two counts of First-Degree Murder on December 5, 2002. Trial was held January 22-26, 2007 before the Honorable Judge Charles Arnold, Circuit Judge of the Fourth Judicial Circuit in and for Duval County. The jury found the Defendant, Jason Simpson, guilty of both counts of First-Degree Murder on January 29, 2007. The penalty phase of the trial began on February 6, 2007 and resulted in an 8-4 jury recommendation in favor of the death penalty for the murder of Archie Crook Sr.; and a 9-3 vote recommendation for the death penalty for the murder of Kimberli Kimbler. A *Spencer*[1] hearing was held on March 8, 2007 at which hearing the defendant read a letter to the court, but no other evidence was presented.

In the sentencing order, the court gave great weight to five (5) statutory aggravators in determining the defendant's sentence for both Counts One and Two, including: 1) Crime(s) committed by a convicted Felon while serving Felony Probation pursuant to Fla. Stat. 921.141(5)(a); 2) Prior Felony conviction involving the use or threat of violence pursuant to Fla. Stat. 921.141(5)(b); 3) Capital felony was committed while defendant

[1] Pursuant to *Spencer v. State*, 615 So. 2d 688 (Fla. 1993)

was engaged in the commission of the crime of Burglary pursuant to Fla. Stat. 921.141(5)(d); The crime was especially Heinous, Atrocious, and Cruel (hereafter HAC Aggravator) pursuant to Fla. Stat. 921.141(5)(h); 5) The Capital felony was committed in cold, calculated, and premeditated matter (hereafter CCP aggravator) pursuant to Fla. Stat. 921.141(5)(i).

The Defendant introduced one statutory mitigator at sentencing, specifically the age of the Defendant at the time of the crime pursuant to Fla. Stat. 921.141(6)(g). The court considered all mitigation evidence jointly as to Counts One and Two in the sentencing order, and gave no weight to the lone statutory mitigator presented in determining the sentence of the defendant. Non-statutory mitigation evidence was presented by counsel in the form of two memorandums that introduced a total of eighteen (18) non-statutory mitigators for the Court's consideration.

Specifically, 1) The Deaths were Relatively Swift. The trial court held that this non-statutory mitigator was not proven and gave it no weight in determining the sentence. 2) Defendant Cooperated with Law Enforcement in Prior Case (Durrance/Crooks). This mitigator was held to be proven and was given considerable weight in considering the sentence of defendant. 3) Defendant Cooperated with Law Enforcement in State v. Wright, 1998. The court held that this mitigator was not proven and

assigned no weight in considering the sentence. 4) Abusive and Deprived Childhood. The court held this mitigator was proven and gave it slight weight in considering the defendant's sentence. 5) Exposed to Alcoholism in Family. The court held that this mitigator was proven and gave it slight weight in considering the sentence of defendant. 6) Unstable Home Environment. The court held this mitigator was proven and gave it slight weight. 7) Absence of a Role Model. The court held this mitigator unproven and therefore assigned it no weight in determining sentence. 8) Addiction to Drugs and Drug Abuse. The court held this mitigator was proven but assigned it little weight in determining sentence. 9) Previous Completion of Substance Abuse Program. The court held that this mitigator was proven but assigned it little weight. 10) Charitable and Humanitarian Deeds. The court held this mitigator was proven but assigned it little weight. 11) Personal Accomplishments (GED/Lundeburg School/FFCJ) The court found this mitigator proven and assigned it slight weight in determining sentence. 12) Artistic Talent. The court held this mitigator proven, but assigned it little weight. 13) Respect to Elders and Family. The court found this mitigator proven, but assigned it little weight. 14) Family and Friends that Love Him. The court held this mitigator proven and assigned it slight weight. 15) Society can be Protected by a Sentence of Life. The court held this mitigator

proven, but gave it no weight in determining sentence. 16) Religious Faith. The court held this mitigator proven and assigned it slight weight. 17) Defendant's Courtroom Behavior. The court held this mitigator proven and assigned it slight weight. 18) Suicide Attempts by Defendant. The court held this mitigator proven and assigned it slight weight in determining sentence.

The Court agreed with the jury in the weighing of the aggravating and mitigating factors, and held the jury was fully justified in both its 8-4 recommendation for death in the murder of Archie Crook Sr., and its 9-3 vote recommendation for death in the murder of Kimberli Kimbler and imposed a Death Sentence for each count on March 29, 2007.

Statement of Facts

On July 16, 1999 Archie Crook Sr. and Kimberli Kimbler were murdered in their residence located at 1621 Derito Drive in Jacksonville, Florida. The estimate to the time of death was established at trial by Medical Examiner Dr. Margarita Arruza to be around 1:00 am.[2] The bodies of the two victims were discovered the morning of July 16, 1999 by Christopher Howard and Clyde Crook. (ROA pg. 529)

[2] At trial, it was established that the victim had eaten at roughly 11:30 p.m. on July 15, 1999 based on testimony of the victim's son, Archie Crook Jr. (TT. pgs 790-92), and through testimony of Dr. Arruza founded on her examination of the contents of the victim's stomach, which also allowed her to determine that death occurred in the vicinity of one hour after ingestion.

The victims were discovered after Mr. Crook entered the dwelling through an unlocked door leading to the bedroom in which the victims were found. Mr. Crook testified that after determining the victims were dead and calling police, he told no one about the position or condition of the bodies. (ROA pgs. 527-46) Mr. Howard later testified that he told no one of the position of the bodies as he viewed them, with the exception of his girlfriend, Kay Phillips. (ROA pg. 572) The victim's son, Archie Crook Jr., and friend Shawn Smallwood were seen by Mr. Howard at the dwelling where the murders occurred roughly one to two hours before the established time of death. (ROA pg. 551) Archie Crook Jr. and Shawn Smallwood were the last two people known to have seen the victims alive.

After an investigation of the crime scene, involving no less than four (4) Jacksonville Sheriff's Office (hereafter JSO) Detectives, numerous JSO officers, and a number of crime scene evidence technicians that lasted nearly an entire day (ROA pgs. 575-648); Mr. Howard and his young children discovered fibrous materials on a barbed wire fence next to the entrance to the dwelling believed to be evidence, a pair of white socks alleged to be worn by the murderer, and an axe believed to be the murder weapon, toward the rear of the property. (ROA pgs. 562-64)

JSO Detective David Chase testified that after the processing of the evidence and crime scene, no fingerprints of value were found on the doorknob leading from outside to the room in which the victims were found, on the axe believed to be the murder weapon, or on the victims. There was also no indication of forced entry into the dwelling. (ROA pgs. 587-621)

Father Thomas Willis, then the priest of the Most Holy Redeemer Catholic Church, was informed by his lawn service on the morning of July 18, 1999 that a pile of clothing had been noticed near an air duct next to the building. The clothes were not disturbed and Father Willis called the police having heard about the murders that occurred on the previous Friday. (ROA pgs. 704-09) Homicide Detective James Williams was in charge of collecting the clothing, and he directed an officer to package the clothing together, not individually. (ROA pg. 730)

Archie Crook, Sr. was a drug dealer for a number of years prior to his murder, dealing most notably in large amounts of powdered cocaine through his supplier George Durrance. (ROA pg. 865) Archie Crook, Jr. was involved in his father's drug enterprise by selling drugs for his father, and at the time of trial was currently under a federal sentence for conspiracy to distribute cocaine, marijuana, and methamphetamines. (ROA pg. 776)

George Durrance was, at the time of trial, under a sentence of thirty-two (32) years stemming from seven (7) felony drug convictions. Durrance was convicted largely through the cooperation of a number of informants, including the Defendant Jason Simpson whom he had known approximately seven (7) years prior. (ROA pg. 864) Durrance discovered that Simpson had been working with police to convict him through discovery in his case, in which Simpson was listed as a witness. (ROA pg. 885) Durrance candidly admitted that he dealt large amounts of cocaine through Archie Crook, Sr. throughout the 1990's. (ROA pg. 865) Six (6) months prior to the murders, Durrance had a drug-business-related falling-out with Archie Crook Sr. over two (2) kilograms of powdered cocaine that he left with Archie Crook Jr., but had never received reimbursement. At the next transaction, Durrance supplied Archie Crook Sr. with fake cocaine, and kept the money as payment from the previous transaction, angering Archie Crook, Sr. (ROA pg. 866)

At the time of trial in the instant case, Durrance was appealing his sentence by filing numerous post conviction motions through various counsel in an attempt to toll the proceedings in his case until the conclusion of the Simpson case in the hopes that his cooperation and testimony could be used to reduce his sentence. (ROA pgs. 890-92; 926-32) Durrance testified

that one day to one week prior to the murders, Appellant appeared at his house stating that Archie Crook, Sr. had offered him money to kill Durrance. Appellant allegedly stated that he was not going to do so, and was going to rob Archie Crook, Sr. instead. (ROA pg. 874-876) After the murders, Appellant allegedly appeared again and confessed to Durrance that he killed the victims, stating he went into the dwelling through a window in the laundry room. (ROA pg. 879) Appellant's defense showed at trial that it would have been nearly impossible for anyone to enter the house through said window (ROA pg. 907), and Durrance candidly admitted that he would lie under oath to facilitate a sentence reduction. (ROA pg. 898) Additionally, Durrance did not come forward with the information about Appellant's alleged confessions until late 2001 (the time of his trial).

Archie Crook, Jr. stated that he found out about the murders through Shawn Smallwood the morning of July 16, 1999 at roughly 7:00 a.m. Archie Jr. admitted that he went to Archie Sr.'s house the night of the murder with Smallwood. He stated that his father was eating and that Kim was in bed, but that she answered the door. He also admitted that he possessed a key to the residence, particularly to the back door leading to the bedroom. (ROA pg. 818) He testified that he spent the night with a girl named Heather Smith. (ROA pg. 795) The state did not produce Ms. Smith to verify Archie

Crook, Jr.'s story at trial. Detective James Williams, in the investigation into the murders, was informed by Troy Crook (the brother of the victim) and Misty McNeish (girlfriend of Archie Crook, Jr.) that Archie, Jr. was very upset that his father was having a child with Kimberli Kimbler and made statements to them that "the child would not see the light of day." (ROA pg. 1489) McNeish and Troy Crook would recant under oath having made those statements (ROA pgs. 1481, 1486), however Detective Williams was recalled by the defense to verify that said statements were told to him by said witnesses. (ROA pgs. 1489-90) Brenda Crook Bennett (sister of Archie Crook, Sr.) testified that Archie Jr. threatened to kill "all three of them" if they had the baby. (ROA pg. 1473) Archie Jr. testified that he suspected Appellant was working with law enforcement because Appellant received a time served sentence on a previous charge (ROA pg. 798), and that he remembered telling detectives upon questioning that he knew the position of the bodies as they were found in the house. (ROA pg. 821)

Appellant was born into a troubled family and was forced into a difficult life. Appellant's father, a merchant marine, was away from home nearly 75% of the year. (ROA pg. 1891) Appellant's father was also a heavy drinker and was frequently abusive towards Appellant's mother. This systemic physical abuse was witnessed by Appellant and his sister at a very

young age. (ROA pg. 1870) Appellant's parents divorced when he was young, leaving Appellant and his sister with virtually no family support as the parents were largely absent from his life. (ROA pg. 1875) Appellant's elder sister took it upon herself to raise Appellant. However, she was unable to control Appellant and at times was frightened of him due to his frequent mood swings that sometimes escalated into violent behavior. (ROA pg. 1874) Appellant was a frequent runaway, was known to set fires, and began using drugs at the age of 10. By the time he was a teenager, his drug use had spiraled into a $1,000.00 per week cocaine addiction. (ROA pg. 1875-76)

Despite his troubled youth and upbringing, Appellant displayed a talent for music and was granted a scholarship to Douglas Anderson High School as a teenager. Appellant was also active in his church, was knowledgeable about the teachings of the Bible, and witnessed to friends and acquaintances on different occasions. (ROA pgs. 1898, 1904)

Appellant spent time in the Florida State Prison System throughout his life for a number of convictions. While in prison, Appellant attempted suicide on multiple occasions. (ROA pg. 1877) Eventually, Appellant would attempt to put his life back on track. He would eventually obtain a GED, attend a number of colleges and institutions in attempts to gain a viable skill, and would complete a drug counseling program at River Region Human

Services in 2002. (ROA pg. 1904) Appellant would go on to be a drug counselor to other troubled youth after the completion of this program. Pastor Fred Young testified that Appellant was active in his jail ministry, attending every Saturday church service in jail with fervor, and that he personally counseled Appellant for roughly one year. (ROA pgs. 1912-13)

Appellant was actively assisting a number of law enforcement agencies in the months prior to his being named as a suspect for the murders of Archie Crook, Sr. and Kimberli Kimbler. In addition to his assisting in the investigation of George Durrance, Appellant was working with Clay County officers, and the Federal DEA Agents as an informant. (ROA pg. 668) Appellant would go on to assist law enforcement in the investigation of Robert Walls, who was subsequently convicted of murder. (ROA pg. 1952)

Detective Robbie Hinson was one of the contacts through which the defendant was assisting law enforcement as an informant. He testified that he met with Appellant at his mother's house on July 16, 1999 and noticed a cut on defendant's right hand. Appellant stated that he cut it on his mother's fuse box while attempting to turn the power back on earlier that morning. (ROA pg. 676) JEA technician Russell Durham testified that there was a power outage in the defendant's mother's neighborhood that morning and

that JEA received a call from a "Mr. Simpson" at 7:56 a.m. regarding a power outage. (ROA pg. 1467) No additional follow up investigation was conducted by JSO officers to verify defendant's statements regarding the cut.

Appellant testified that he was at his mother's house the night of the murders and that he stayed there the entire night. He stated that prior to the murders, Archie Jr. contacted him about "hitting a lick" (which equated to stealing a car) and that he needed to borrow some clothing. Appellant stated that Archie Jr. arrived at his mother's residence and borrowed some clothing, finding a business card from Detective Tom Waugh of Clay County in his dresser drawer and leaving it on top of the dresser when he left. (ROA pg. 1388) Archie Jr. denied ever having been at Appellant's mother's house prior to his father's death at trial (ROA pg. 805), later under cross examination he would admit that he had been there prior to his father's death. (ROA pg. 818)

Law enforcement initially learned of Appellant's alleged involvement in the murders through statements given by family members of Archie Crook, Sr., notably Archie Jr. and his mother Rosie Crook, the latter of whom was at the time still technically married to the victim, but lived apart from Archie Sr. and his girlfriend Kimberli. Detective Hinson returned to

Appellant's mother's house on July 20, 1999 and searched the house while the defendant was not present, finding nothing linking defendant to the scene of the crime. (ROA pg. 683) Detective Hinson returned the next day and asked Appellant for a cheek swab, to which Appellant willingly submitted a sample. (ROA pg. 661) Appellant, over two (2) years later in the investigation, willingly came to JSO headquarters and spoke with Detectives Eason and Gilbreath to discuss the case. (ROA pg. 948)

DNA samples were obtained from multiple evidentiary items collected in and for this case. These samples were eventually tested using multiple forms of DNA testing, most notably the then new technology of DNA nucleic testing at the FDLE Orlando branch laboratories. Analyst Charles Badger testified at trial (in summary) that no DNA found at the scene of the crime matched Appellant (ROA pg. 1144-49), no DNA found on the murder weapon matched Appellant (ROA pg. 1160-61), no DNA from the tennis shoes found at the Church matched Appellant (ROA pg. 1168), and no DNA could be extracted from the baseball hat found by the Church. (ROA pg. 1163) Mr. Badger testified that DNA samples taken from the elastic waist-band and leg cuffs of the sweatpants found at the church matched Appellant. (ROA pg. 1187-89) Samples collected from the neck band of the sweatshirt found at the church showed a DNA mixture and that

Appellant was a contributor. Archie Crook, Jr. could not be excluded as a minor contributor to the sample collected from the neckband. (ROA pg. 1191, 1251) Two hairs found among the debris collected from the package in which the clothing was stored were found to match the DNA profile of Appellant. (ROA pg. 1198)

Heather Velez, an FDLE Microfiber analyst, found that the fibrous material samples taken from the barbed wire fence matched fibers in both the sweatpants and sweatshirt found at the church. (ROA pg. 1281, 1283)

The state's theory of the case at trial was that Appellant entered the unlocked back door and killed Archie Crook, Sr. because Archie Sr. learned that Appellant was working with the police as an informant. Kimberli Kimbler was killed as an afterthought. The State argued that this killing then was a preemptory action taken by Appellant before Archie Sr. could retaliate in some manner. Appellant then allegedly left through the back door, snagging his clothing on the barbed wire fence near the door, before discarding his socks and the murder weapon on the property. Appellant then supposedly discarded the remainder of his clothing behind the air conditioning vent near the Most Holy Redeemer Catholic Church before leaving the area. (ROA pg. 1590-1649) Detective James Williams stated at trial only that Archie Crook Jr. was eventually eliminated as a suspect in the

case without further elaboration into any additional investigation pursued by the JSO into his involvement. (ROA pg. 1495)

On February 6, 2007, before the beginning of the penalty phase of Appellant's trial, nine days after the polling of the jury after the verdict was read, the trial court stated that Juror Cody saw the Judge's Judicial Assistant as she walked through the door and said she would like a word with the court. (ROA pg. 1826) Upon the jury entering the courtroom (with the public present), the Judge asked her if she had anything to say, whereby she replied that she wanted the court to know that "there were some questions that were unanswered before the verdict was made." (ROA pg. 1828) Subsequent to this statement by the juror, the Court had a side-bar discussion with both sides, whereby defense counsel moved for a mistrial and a jury interview if the judge denied the motion for mistrial. Defense counsel also stated that he didn't think "we can proceed penalty-wise if there's a question of guilt and she's raised it." (ROA pg. 1828)

Defense counsel also pointed out that the victim's family has taken up three or four rows in the courtroom, and asked the court to clear the courtroom for questions, as counsel believed Juror Cody was feeling very uncomfortable, and obviously wanted to talk with the Judge without the victim's family members present. (ROA pg. 1829) The Judge declined to

exclude anybody from the court proceedings. Defense counsel stated he was "concerned with her [juror Cody] timidness and this is the juror that I think was looking down doing the verdict," whereby the Court stated, "right." (ROA p. 1830)

Defense counsel continued by stating that Juror Cody had expressed her desire to speak with the court in private, and with three rows of family and press here, "I think that's highly prejudicial to her and I don't know if the State objects to maybe going into chambers or something . . . I'm concerned that would prejudice Mr. Simpson." (ROA pg. 1830) The Judge responded by stating that he did not think he could do this action in private and "exclude the rest of the world, and there was no law supporting that, and that you "can't exclude the people from what's going on, that's very clearly the law, so I'm going to follow it." (ROA pg. 1830)

The parties then ended the side-bar conference and the Court continued its questioning with Juror Cody. The juror stated there was some confusion as to how you make the decision (the first verdict), and that "some people were under the impression, as well as myself, that we had to come to a unanimous decision before we left." (ROA pg. 1831) Defense counsel was then allowed to ask questions to the Juror, and in response to counsel's question as to whether she was comfortable with her verdict, she replied, "he

can ask me that?" Juror Cody also said some people feel he's guilty and some people don't." (ROA pg. 1833) The juror further said "that the way it [the evidence] was explained to them was the evidence went is the physical evidence." (ROA pgs. 1834-835) The Judge then asked the juror was a guilty verdict her verdict, whereby she replied "no", and reasoned that her verdict was no because "they [referring to the fellow jurors] told us to look at the physical evidence . . . and not to take the things that the people said into consideration, just look at the physical evidence."

Juror Cody then answered in the affirmative when the court asked her that if some of her fellow jurors were saying that you should count some part of the evidence more than other parts of the evidence. (ROA p. 1835) She then stated that after she was persuaded to rely on certain evidence over other evidence, she decided to vote guilty "but that's - - I kind of felt like I had to do that." (ROA pg. 1836) When counsel inquired, "Was the guilty verdict your individual verdict based on what you heard?," Juror Cody answered "no". (ROA pg. 1836)

Lastly, in response to the prosecutor's questions, there was a discussion amongst jurors as to the weighing of evidence and what evidence was strong and not strong, certain jurors felt some evidence was stronger than others, and that collectively as a jury reached a unanimous verdict last

Monday that Appellant was guilty. (ROA pg. 1837-38) However, when asked that during the deliberation, and weighing all the evidence and taking into the consideration and viewpoints of the other jurors, the jury deliberations and weighing was not the reason she came back with a verdict of guilty. (ROA pg. 1838) Juror Cody stated that her verdict of guilty was because she knew "knew it had to be a unanimous decision and they also – my understanding was I needed to look at the physical evidence not take into consideration everyone's testimony as well."

Defense counsel renewed his motion for mistrial, and stated that Juror Cody indicated a verdict of guilty was not her individual vote. (ROA pg. 1839) The Judge denied said motion "at this time," and stated that counsel may make a further inquiry later on or he may not. (ROA pg. 1839-1840)

Before the jury came back with their recommendation of death, the judge revisited the Juror Cody issue, and stated that "my plan would be once they receive their recommendation, I would then have them all go back into the jury room again, ask Ms. Cody a few more questions and then make a decision whether questions would be asked of the rest of them or not an decision once that process is over they'll go home, and proceeded to ask her more questions." (ROA pg. 1974-80) The judge then asked Juror Cody a couple of questions pertaining to whether she indeed had given a verdict of

guilty, and the issues that arose earlier about her confusion were because of conversations with her fellow jurors or other matters than may have occurred during the deliberations, whereby she replied in the affirmative. (ROA pg. 1981) Defense counsel then asked the court to ask her who the other jurors were that were disagreeing and to ask her if she remembers being hesitant when she was initially polled. (ROA pg. 1983)

STANDARD OF REVIEW

Pursuant to Florida Rules of Appellate Procedure 9.210(b)(5), initial briefs must contain "[a]rgument with regard to each issue including the applicable appellate standard of review."

On direct appeal, reverse *Williams* rule decisions are normally reviewed under the abuse of discretion standard. *State v. Storer*, 920 So. 2d 754, 758 (Fla. 2nd DCA, 2006); *See also White v. State*, 817 So. 2d 799 (Fla. 2002); *Chandler v. State*, 702 So.2d 186, 195 (Fla. 1997). Similarly, this Court's case law indicates a trial court's ruling on a motion for mistrial is subject to an abuse of discretion standard of review. *Jones v. State*, 751 So. 2d 537 (Fla. 1999); *See Cole v. State*, 701 So. 2d 845, 853 (Fla. 1997), cert. denied, 118 S. Ct. 1370 (1998); *Power v. State*, 605 So. 2d 856, 860 (Fla. 1992). Finally, the decision to allow a jury interview is within the discretion of the trial court. *Kasper Instruments, Inc. v. Maurice*, 394 So. 2d 1125,

1128 (Fla. 4th DCA 1981). The standard of review for the appellate court is whether the trial court abused its broad discretion. *Id*.; *Ford Motor Co. v. Kikis*, 401 So. 2d 1341 (Fla. 1981). The decision to permit or deny the juror interview is entrusted to the sound discretion of the trial court. *Odom v. State*, 403 So. 2d 936 (Fla. 1981), cert. denied, 456 U.S. 925, 102 S.Ct. 1970, 72 L.Ed.2d 440 (1982); *Kasper Instruments, Inc. v. Maurice*, supra. In *Canakaris v. Canakaris*, 382 So.2d 1197, 1203 (Fla. 1980), this Court opined, "[i]f reasonable men could differ as to the propriety of the action taken by the trial court, then the action is not unreasonable and there can be no finding of an abuse of discretion." In turn, discretion "is abused only where no reasonable man would take the view adopted by the trial court," *Id*., at 1204, or when "the judicial action is arbitrary, fanciful, or unreasonable," *White*, 817 So.2d at 806.

Conversely, the standard of review for improper argument is whether the appellate court can see from the record that the prosecutor's conduct did not prejudice the defendant so, unless this conclusion can be drawn from the record, the judgment should be reversed. *Robinson v. State*, 881 So. 2d 29 (Fla. 1st DCA, 2004). Generally, the rule is that "failing to raise a contemporaneous objection when improper closing argument comments are made waives any claim concerning such comments for appellate review."

Brooks v. State, 762 So. 2d 879, 898 (Fla. 2000). A single exception to this rule is when the unobjected-to comments rise to the level of fundamental error. *Id*. at 898-99. "In order for an error to be fundamental and justify reversal in the absence of a timely objection, the error must reach down into the validity of the trial itself to the extent that a verdict of guilty could not have been obtained without the alleged error." *Id*. at 899 (internal quotations omitted).

Lastly, to reverse a case based on harmful error, an appellate court must find "the error complained of has resulted in a miscarriage of justice." Fla. Stat. § 59.041. Specifically, an error is not harmful unless it injuriously affects the substantial rights of the appellant. Fla. Stat. § 924.33. The harmless error test was set forth by the United States Supreme Court in *Chapman v. California*, 386 U.S. 18 (1967). *State v. DiGuilio*, 491 So.2d 1129 (Fla. 1986), elucidated this test as requiring the state, as beneficiary of a constitutional error, to establish beyond a reasonable doubt that an error complained of did not contribute to a defendant's conviction.

STATEMENT OF THE ISSUES INVOLVED

1. **THE TRIAL COURT ERRED IN NOT GRANTING A MISTRIAL AND/OR REQUESTING THE JURY TO DELIBERATE FURTHER IN APPELLANT'S CASE WHEN A JUROR RECANTED HER GUILTY VERDICT BEFORE EVIDENCE WAS PRESENTED IN THE PENALTY PHASE. AS A RESULT, APPELLANT'S RIGHTS UNDER THE FIFTH, SIXTH, AND FOURTEENTH AMENDMENTS OF THE U.S. AND FLORIDA CONSTITUTIONS WERE VIOLATED, AND A NEW TRIAL SHOULD BE GRANTED**

2. **THE TRIAL COURT ERRED WHEN IT DENIED DEFENSE COUNSEL'S MOTION TO EXCLUDE THE PUBLIC FROM THE COURTROOM DURING JUROR CODY'S TESTIMONY AS TO WHY THE GUILTY VERDICT WAS NOT HERS**

3. **THE TRIAL COURT ERRED IN ALLOWING THE JURY TO PROCEED TO THE PENALTY PHASE OF APPELLANT'S TRIAL AFTER HEARING TESTIMONY FROM A JUROR THAT THE PREVIOUS GUILTY VERDICT WAS NOT HERS. ALLOWING THE JURY TO PROCEED WITH THE PENALTY PHASE WAS IN VIOLATION OF APPELLANT'S FIFTH, SIXTH, AND FOURTEENTH AMENDMENT RIGHTS OF THE U.S. CONSTITUTION AND FLORIDA CONSTITUTIONS**

4. **THE TRIAL COURT ERRED IN NOT GRANTING DEFENDANT'S MOTION FOR A JURY INTERVIEW WHEN A JUROR ON APPELLANT'S CASE RECANTED HER PREVIOUS GUILTY VERDICT BEFORE THE JURY PROCEEDED TO THE PENALTY PHASE OF APPELLANT'S TRIAL. SAID ERROR WAS IN VIOLATION OF APPELLANT'S FIFTH, SIXTH, AND FOURTEENTH AMENDMENT RIGHTS OF THE FLORIDA AND U.S. CONSTITUTIONS.**

5. **THE COURT ERRED BY NOT MAKING A DEFINITIVE RULING ON DEFENDANT'S "MOTION FOR PRE TRIAL RULING ON ADMISSIBILITY OF "REVERSE" WILLIAMS RULE EVIDENCE", THEREBY NOT ALLOWING DEFENSE COUNSEL TO ADDRESS RELEVANT IMPEACHMENT INFORMATION PERTAINING TO STATE WITNESSES WHICH PREJUDICED APPELLANT AT TRIAL**

6. **THE STATE COMMITTED PROSECUTORIAL MISCONDUCT IN THE GUILT AND PENALTY PHASE CLOSING ARUGMENTS AT TRIAL. THE STATEMENTS MADE BY THE PROSECUTION CONSTITUTED FUNDAMENTAL ERROR AND APPELLANT IS ENTITLED TO A NEW TRIAL**

SUMMARY OF THE ARGUMENTS

1. The trial court's decision to proceed directly to the penalty phase and to deny defense counsel's motion for mistrial essentially ignored the issue that the verdict of guilt presented by the jury was not a unanimous one as required by law. The juror in question clearly stated on the record that her decision was not one for guilt, and expressed a clear misunderstanding of the jury instructions as given by the court. The trial court, in choosing to deny the motion for mistrial, should have sent the jury back in for further deliberations as required by Florida law. As the trial court did not grant the motion for mistrial, and did not require the jury to deliberate further, a new trial should be granted.

2. The trial court erred in denying defense counsel's motion to close the courtroom with its decision to not exclude the public (and more importantly the family of the victims) during the questioning and inquiry of a juror displaying visible nervousness who had expressed a desire to speak to the court in private and that the verdict of guilt was not a unanimous one. The court's decision to not clear the courtroom did not allow the juror in question to be completely candid with the court, as the juror was visibly uncomfortable with the focus of the public placed upon her. This decision was highly prejudicial to the defendant and a new trial should be granted.

3. The trial court's decision to wait until the conclusion of the penalty phase, and after the recommendation of death was given, to address the issue of the guilty verdict and juror issue was prejudicial to the defendant. In waiting to address the issue until after the penalty phase the court allowed the jurors, specifically the jurors expressing concerns about the guilty verdict, to hear testimony of Appellant's prior crimes and the State's arguments in favor of finding statutory aggravators. This was highly prejudicial to Appellant as the outcome of the juror issue was irrevocably tainted by penalty phase testimony and a new trial should be granted.

4. The trial court's denial of defense counsel's motion to interview jury members prejudiced Appellant and the overall integrity of the verdict as the defense was unable to determine if the jury was subjected to any overt influences, improper external influences, improper actions

by other jury members, and so forth during deliberations in violation of Florida law. As such, a new trial should be granted.

5. The trial court's failure to rule on the defense Motion for pre-trial admissibility, combined with its failure to conduct a required probative versus prejudicial weighing test, denied the defense from introducing critical reverse William's rule testimony relevant to a number of state witnesses testifying at trial.

6. The State committed fundamental error during the guilt and penalty phase closing arguments by making improper comments on the evidence as presented, creating an imaginary script in the minds of the jurors, bolstering the credibility of its witnesses, and by making improper attacks on Appellant. Said error was not harmless and a new trial should be granted.

ARGUMENT ONE:

THE TRIAL COURT ERRED IN NOT GRANTING A MISTRIAL AND/OR REQUESTING THE JURY TO DELIBERATE FURTHER IN APPELLANT'S CASE WHEN A JUROR RECANTED HER GUILTY VERDICT BEFORE EVIDENCE WAS PRESENTED IN THE PENALTY PHASE. AS A RESULT, APPELLANT'S RIGHTS UNDER THE FIFTH, SIXTH, AND FOURTEENTH AMENDMENTS OF THE U.S. AND FLORIDA CONSTITUTIONS WERE VIOLATED, AND A NEW TRIAL SHOULD BE GRANTED

After Juror Cody expressed hesitation, ambiguity, and timidness in her verdict of guilt when polled, and subsequent to the start of the penalty phase when Juror Cody stated the guilty verdict was not hers, the trial court had to either grant a mistrial or send the jury back to deliberate. Instead the trial court allowed the penalty phase to begin and did not resume questioning of Juror Cody until the end of the penalty phase. Because the jury was effectively discharged when the start of the penalty phase proceeding began, Appellant must be granted a new trial, as the jury was discharged from the guilt phase after a juror expressed the verdict of guilty was not her own, thus creating unanimity in the verdict. *See* *Walters v. State*, 786 So. 2d 1227 (Fla. 4th DCA 2001) [*When a juror expresses that a verdict is not his or her verdict, while the jurors are still in the jury box, a verdict has not been reached, and a court must either declare a mistrial or instruct the jury to deliberate further*]. A motion for mistrial is directed to the sound discretion of the trial court, and should be granted only when necessary to ensure that a

defendant receives a fair trial. *Miles v. State*, 839 So. 2d 814 (2003 Fla. App. LEXIS 2599)

On February 6, 2007, days after the jury found Appellant guilty of First-Degree Murder, and before the beginning of the penalty phase, Juror Cody asked to speak with the trial court regarding the verdict. (ROA, pg. 1828) In short, Juror Cody said the verdict of guilty was not hers, and that the individual guilty verdict was not hers. Juror Cody also said "some people feel he's guilty and some people don't." (ROA, pg. 1833) The juror further said "that the way it [the evidence] was explained to them was the evidence went is the physical evidence." (ROA, pgs. 1834-1835) The judge then asked the juror was the guilty verdict her verdict, and she replied "no." She reasoned that her verdict was guilty because "they [apparently referring to the fellow jurors] told us to look at the physical evidence . . . and not to take the things that the people said into consideration, just look at the physical evidence." (ROA, pg. 1838)

More importantly, when she was asked if this was her decision during the deliberation, after weighing all the evidence, and taking into the consideration and viewpoints of the other jurors, she stated that the jury

deliberations and weighing was not the reason she came back with a verdict of guilty. (ROA, p.g 1838).[3]

According to defense counsel, Juror Cody's initial jury poll indicated her timidness, as she was looking down when she stated her verdict. (ROA, pg. 1830) The trial court apparently acknowledged this fact and observation by saying "right" after counsel's statement. (ROA, pg. 1830)

Moreover, during the instant conversation with the parties, Juror Cody requested to speak privately with the judge, and according to defense counsel, was feeling uncomfortable, as there were approximately three rows filled in front of the courtroom with the victim's family. (ROA, pg. 1829-1830). Defense counsel twice moved for a mistrial, stating the aforementioned reasons and further stating that he "didn't think they could proceed penalty-wise if there's a question of guilt and she's raised it." (ROA, pg. 1828), and that if a mistrial wasn't granted, a juror interview would be appropriate, stating "I think that's highly prejudicial to her and I don't know if the State objects to maybe going into chambers or something . . . I'm concerned that would prejudice Mr. Simpson." (ROA, pg. 1830)

[3] (ROA, p.g 1838). Juror Cody stated that her verdict of guilty was because she knew "knew it had to be a unanimous decision and the they also – my understanding was I needed to look at the physical evidence not take into consideration everyone's testimony as well."

The Court responded by stating that he did not think he could do this action in private and "exclude the rest of the world, and there was no law supporting that, and that you 'can't exclude the people from what's going on, that's very clearly the law, so I'm going to follow it.'" (ROA, pg. 1830)

Defense counsel then renewed his motion for mistrial, and stated that Juror Cody indicated a verdict of guilty was not her individual vote. (ROA pg.1839) The Court denied said motion "at this time," and stated that counsel may make a further inquiry later on or he may not. (ROA, pg. 1839-840)

The judge then proceeded with the penalty phase and, after the presentation of evidence and closing arguments, and right before the jury came back with their recommendation of death, the judge revisited the Juror Cody issue, and stated that "my plan would be once they receive their recommendation, I would then have them all go back into the jury room again, ask Ms. Cody a few more questions and then make a decision whether questions would be asked of the rest of them or not an decision once that process is over they'll go home, and proceeded to ask her more questions." (ROA, pg. 1974-80) The judge then asked Juror Cody a couple of questions pertaining to whether she indeed returned a verdict of guilty, and the issues that arose earlier about her confusion were because of conversations with her

fellow jurors or other matters than may have occurred during the deliberations, whereby she replied in the affirmative. (ROA, pg. 1981) Defense counsel then asked the court to ask her who the other jurors were that were disagreeing and to ask her if she remembers being hesitant when she was initially polled. (ROA, pg. 1983)

Further, on March 8, 2007, defense counsel discussed a written motion to interview jurors, and stated that because of the two phase jury, guilt phase and penalty phase, the jury actually was not discharged prior to the jury issue being raised. The court replied that he went along with the penalty phase, and did not wish to inquire any further of that juror at that time because I wanted her to give her undivided attention to the penalty phase issues. (ROA, pgs. 1756-57) The trial court stated that it was his belief that the discharge of the jury occurred when the parties got a guilt phase verdict and the jury was sent away for a matter of days, which makes it tantamount to a regular non-penalty case, where they are, in fact, discharged. (ROA, pg. 1757) (However, the trial court does admit that it did not find any case directly on point with this issue, and stated it was a case of first impression).

The trial court erred in not granting a mistrial and/or making the jurors deliberate further in Appellant's case, as Juror Cody showed ambiguity

when polled as to her verdict, and after polling but before the start of the penalty phase (but still in control of the court) stated to the court that the verdict of guilty was not her verdict, and named approximately three other unnamed jurors who expressed this view. (ROA, pg. 1835)

Fla. R. Crim. P. 3.440 provides that unless disagreement is expressed by one or more of the jurors, the verdict shall be entered of record and the jurors discharged from the cause, but no verdict may be rendered unless all the trial jurors concur with it. Fla. R. Crim. P. 3.450 provides that if a juror dissents, the court must direct that the jury be sent back for further proceedings.

Chung v. State, 641 So. 2d 942 (Fla. 5th DCA 1994) illustrates Mr. Simpson's point. In *Chung*, when the judge polled the jury and asked each juror whether he or she concurred in the verdict, one juror hesitated (though concurred) and later indicated that she did not concur in the verdict in the appellant could be incarcerated for the offense. The trial court then discharged the jury. The court, at a subsequent hearing, issued an order finding that because the original verdict had been accepted and recorded, the discussion afterwards was a nullity, and the jury's guilty verdict would stand, thereby denying defendant's motion for mistrial or new trial. *Id.* On appeal, the Florida Fifth District Court of Appeals reversed and remanded,

directing the trial court to declare a mistrial because a juror, while still in the jury box with the jury assembled and still under control of the court, expressed that she did not concur in the verdict, the court was required to declare a mistrial or instruct a jury to deliberate further. *Id.*

Similarly, in *State v. Thomas,* 405 So. 2d 220 (Fla. 3rd DCA 1981), the jury returned with a guilty verdict, and the clerk asked the jury whether the verdict was theirs, and it appeared all members responded simultaneously that it was, as no objections were voiced. Following the jury's dismissal, Juror Bennett waited outside of the courtroom and expressed to one or more persons that the verdict was not hers. She explained that foreman had pressured her to accede to the guilty verdict. Thereafter, defense counsel motioned to interview the jurors based on Juror Bennett's statements made immediately following the trial. At the hearing, there was conflicting evidence as to whether Juror Bennett had, in fact, stated that she acceded to the verdict. Juror Bennett testified that she did not say anything when the clerk ordered all of the jurors to answer during polling. Other jurors testified that they had heard Juror Bennett respond "yes" when asked whether the verdict was hers. The clerk testified that Juror Bennett's response was "huh." The clerk further stated that she did not intervene when she heard Bennett's

testimony because the clerk did not feel it was her responsibility. In granting the motion for new trial, the court explained:

> *I cannot resolve this matter and I believe for that reason a reasonable doubt exists as to what response, if any, she did make and whether she understood show could make a response and in light of those facts, I think that if I'm going to err, I best err on the side of the defendant, and give him a new trial.* Id. at 221.

The Third District Court of Appeals affirmed stating:

> *When it is abundantly clear that a juror either did not respond to the question or that her response was ambiguous, the matter should be brought to the attention of the trial judge immediately upon the failure of the juror to properly respond, either by counsel for the State or the defense, official court personnel, i.e., deputy clerk, or the official court reporter. The failure to bring such to the attention of the trial court at such time should not preclude the trial court, after appropriate inquiry, from granting a new trial when he is in doubt as to the unanimity of the verdict.* Id. at 222.

See also N.J. v. Milton, 178 N.J. 421 (N.J. 2004) [*Holding that a juror's final response indicating assent with the verdict may not eradicate all doubt created by prior ambiguous or evasive answers, and that the circumstances of each case are unique, and thus a bright-line rule for determining whether a juror has concurred fully with the verdict is neither reasonable nor desirable. However, because the primary purpose of the poll is to reveal coerced decisions, a trial court faced with an uncertain or hesitant juror*

must elicit a clear response by using measures that afford the juror an opportunity to express freely his or her present state of mind about the verdict. The precise methodology to be used is less important than the fact that the poll ensures that a juror's concurrence with the verdict is devoid of any ambiguity of coercion.].

In Appellant's case the following facts are clear: (1) Juror Cody indicated to the Judge and the parties involved that the verdict of guilt was not hers and she independently did not vote for the defendant to be guilty; (2) according to counsel and apparently assented to by the trial court, Juror Cody was the timid juror who was looking down when polled as to her verdict, showing hesitation and ambiguity as to her verdict; (3) Juror Cody indicated that the verdict of guilt was not unanimous among the jurors; (4) the penalty phase had not begun when the first three aforementioned facts arose, and no evidence had yet to be presented at said penalty phase, and the jury was still in the court's control, empanelled, and in the jury box (5) Prior to the beginning of the penalty phase, the Judge denied defense counsel's motion for mistrial, motion to interview jurors, and did not order the juror to deliberate as to the verdict again; (5) the Judge asked Juror Cody more questions after the jury came back with a recommendation of death.

The instant case is similar to *Chung* and therefore the holding in *Chung* should be followed. In both cases the jury was polled and each juror agreed that the verdict read was his or her individual verdict, but one juror did so with noticeable hesitancy. In both cases the hesitating juror notified the court before the jurors were discharged as to the verdict of guilt being not their verdict. The fact that the jury in *Chung*'s issue arose within a minute of polling and the issue in Appellant's case arose after some days, does not defeat the argument. Appellant's jury was still in control of the trial court, was still empanelled, still in the jury box, and was not discharged as to their original verdicts. *See* *People v. Bonillas*, 48 Cal. 3d 757 [*Holding that in a death penalty case the commencement of the penalty phase trial and the receipt of penalty phase evidence had the same effect as a discharge: the incalculable and irreversible effect of exposing the jury to improper influences.]*. *See also* *The People v. Bolter*, 227 Cal. App. 3d 653 (Court of Appeal of California, 1991).[4]

[4] Appellant is mindful of cases such as *Mitchell v. State*, 527 So. 2d 179 (Fla. 1988) *Parker v. State*, 336 So. 2d 426 (Fla. 1st DCA 1976), and their progeny. However, as the jury was not discharged as to the guilt phase and Juror Cody expressed her dissent with the verdict before beginning of the penalty phase, the trial court's arguments that Juror Cody's concerns where matters inherent in the verdict and relating to jury deliberations is of no consequence, as the crux of the issue is whether the court should have granted a mistrial or had the jurors deliberate once more before the start of

The facts demonstrated above show that Appellant is entitled to a new trial as with hesitation during the polling, and before the start of the penalty phase Juror Cody indicated that she did not concur with the verdict of guilty, and thereby there was not unanimity in the verdict. The trial court, aware of this ambiguity in the juror's verdict and its unanimity, should have granted defense counsel's motion for new trial/mistrial or ordered the jury to deliberate further. *State v. Thomas,* 405 So. 2d 220 (Fla. 3rd DCA 1981)*; See also N.J. v. Milton*, 178 N.J. 421 (N.J. 2004)

Instead, the court discharged the jury by ordering them to proceed to the penalty phase, thereby ending the jury's ability to be re-empanelled to hear any matters relating to the same (guilt phase) case. *Chung v. State*, 641 So. 2d 942 (5th DCA 1994*) [holding that once a jury has been discharged it cannot be re-impaneled to hear any matters relating to the same case]*. *See also Lee v. State*, 294 So. 2d 305 (Fla. 1974). [*holding that* as *a general rule, once a jury is discharged it cannot be re-impaneled to hear matters ruling to the same case. This is so because after discharge the members lose their separate identity as a jury and because they are subject to outside influences.]*.

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the penalty phase. In fact, the trial court admits the jurors were not "officially" discharged as to the guilt phase portion (ROA, pg. 862)

Moreover, it does not appear in the record that the state objected to this issue, thereby waiving same.

In conclusion, Appellant respectfully asks this Court to reverse and remand his case for a new trial, as the trial court discharged the jury from the guilt phase when the verdict was not unanimous, and Juror Cody specifically stated the verdict of guilty was not her verdict, and indicated other juror held the same belief.

ARGUMENT TWO

THE TRIAL COURT ERRED WHEN IT DENIED DEFENSE COUNSEL'S MOTION TO EXCLUDE THE PUBLIC FROM THE COURTROOM DURING JUROR CODY'S TESTIMONY AS TO WHY THE GUILTY VERDICT WAS NOT HERS

In Appellant's case, after Juror Cody's apparent ambiguous affirmation of the verdict during polling, and her subsequent request to speak to the trial court in private regarding her verdict, defense counsel motioned to have the courtroom cleared, as Defense counsel also pointed out that the victim's family has taken up three or four rows in the courtroom, and asked the court to clear the courtroom for questions, as counsel believed Juror Cody was feeling very uncomfortable, and obviously wanted to talk with the Judge. (ROA, pg. 1829) The Judge declined to exclude anybody from the court proceedings. Defense counsel stated he was "concerned with

her [juror Cody] timidness and this is the juror that I think was looking down doing the verdict," whereby the Court stated, "right." (ROA, p. 1830)

Defense counsel continued by stating that the Juror has expressed her desire to speak with the court in private, and with three rows of family and press here, "I think that's highly prejudicial to her and I don't know if the State objects to maybe going into chambers or something . . . I'm concerned that would prejudice Mr. Simpson." (ROA, pg. 1830) The Judge responded by stating that he didn't think he could do this action in private and "exclude the rest of the world, and there was no law supporting that, and that you "can't exclude the people from what's going on, that's very clearly the law, so I'm going to follow it." (ROA, pg. 1830) [5]

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[5] The trial court has a right to close the juror interviews where matters which may inhere in the verdict and the jury's deliberations may be revealed. *See Sentinel Star Company v. the Honorable Claude R. Edwards*, 387 So. 2d 367 (5th DCA 1980); *Marks v. State Rd. Dept.*, 69 So. 2d 771 (Fla. 1954). The rule limiting juror interviews is founded upon the sound policy of preventing litigants or the public from invading the privacy of the jury room. *Velsor v. Allstated Ins. Co*, 329 So. 2d 391 (Fla. 2nd DCA 1976), Fla. R. Civ. P. R. 1.431(g) does not give the trial court additional authority to close juror interviews, but sets out the heretofore inherent discretion to control juror interview proceedings.

A fundamental constitutional right, such as the right to a public trial, can be waived when the defendant so chooses, so long as the waiver is voluntary knowing, and intelligent. *Berkuta v. State*, 788 So. 2d 1081 (Fla. 4th DCA 2001). Case law does not require that the right to a public trial, like other fundamental rights such as the right to counsel and the right to a jury trial, be waived expressly and personally by the defendant on the record. A defense

Contrary to the trial court's belief, the Sixth Amendment of the U.S. Constitution's right to a public trial is a right of the defendant in criminal cases only and not a right of the public or of the press. Sentinel Star Company v. the Honorable Claude R. Edwards, 387 So. 2d 367 (5th DCA 1980); U.S. v. Sorrentino, 175 F. 2d 721, *cert. denied* 338 U.S. 868 (1949)(*Holding that the right to a public trial is a constitutional right belonging to the defendant and he/she has the right to waive it.").* In determining restrictions to be placed upon access to judicial proceedings, the court must balance the rights and interest of the parties to litigation with those of the public and press. *Id.*

There are two tests used to determine whether closure of court proceedings is warranted. First, when a total closure of a court proceeding is sought, the trial court must utilize the test sought out in Waller v. Georgia, 467 U.S. 39, 104 S. Ct. 2210, (1984). The *Waller* court set forth the following test for the proper closure of a courtroom:

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counsel's affirmative representation to the court that the defendant consents to excluding persons otherwise entitled to be present in the courtroom is sufficient to effectively waive the defendant's right to a public trial. *Id.*

The rule of limiting juror interviews is founded upon the sound policy of preventing litigants or the public from invading the privacy of the jury room. Sentinel Star Company v. the Honorable Claude R. Edwards, 387 So. 2d 367 (Fla. 5th DCA 1980).

> (1)The party seeking to close the hearing must advance an overriding interest that is likely to be prejudiced (2) the closure must be no broader than necessary to protect that interest (3) the trial court must consider reasonable alternatives to closing the proceeding, and (4) it must make findings adequate to support the closure. *Id.*

Continuing, other courts, including the Second, Eighth, Ninth, Tenth and Eleventh Circuits Court of Appeals, have held that if there is only a partial closure of the courtroom, the *Waller* test does not apply, and have adopted a less demanding test requiring the party to seeking the partial disclosure to show a "substantial reason" for the closure. *See* *Ex parte Easterwood (In re: Todd Olen Easterwood v. State of Alabama)*, 2007 Ala. LEXIS 97; *Douglas v. Wainwright*, 714 F. 2d 1532 (11th Cir. 1983), vacated and remanded, 468 U.S. 1206, 104 S. Ct. 3575, panel opinion reinstated, 739 F. 2d 531 (11th Cir. 1984); *U.S. v. Farmer*, 32 F. 3d 369 (8th Cir. 1994); *U.S. v. Galloway*, 937 F. 2d 542 (10th Cir. 1991). A partial closure usually means that the general public is excluded but that family and friends of the defendant are allowed to remain unless a specific reason for excluding them exists, and usually, that members of the press are allowed to remain. *Id.*

Although the trial court deemed "there was no law supporting" the right of Juror Cody to speak to the Court in private—stating, you "can't exclude the people from what's going on, that's very clearly the law, so I'm going to follow it"—precedent indicates this was an incorrect deduction.

(ROA pg. 1830) Clearly, the *Waller* test is the law. Accordingly, the trial court erred in not conducting either the *Waller* test or the less stringent "substantial reason" test for partial closures. Defense counsel's reasons for either a total or partial closure were adequately addressed to the court, yet the court, without case law or analysis, denied same.

Given the fact that this was a death case, and a juror, before the penalty phase, recanted her verdict and made statements and actions that called into question the immediate need for a private hearing, the minimum the court should have done was conduct an inquiry involving either of the two tests, in an effort to determine whether Appellant's request should be honored.[6] Moreover, public policy dictates that inquiry into the thought processes, motives or influences of jurors must be zealously guarded to prevent litigants or the public from invading the privacy of the jury room. *Velsor v. Allstate Ins. Co.*, 329 So. 2d 391 (Fla. 2nd DCA 1976). By not clearing the courtroom, the trial did not zealously guard the privacy of the jury room.

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6 There are a number of designated exceptions to the right of the press of access to judicial proceedings, such as trade secrets, bastardy proceedings, adoption proceedings, and circumstances involving the potential for physical harm or embarrassment to witnesses. *See State ex rel. Gore Newspapers Co. v. Tyson*, 313 So. 2d 777 (Fla. 4th DCA 1975), *overruled on procedural grounds in English v. McCrary*, 348 So. 2d 293 (Fla. 1977).

This inaction by the trial court cannot be considered harmless error. The fact that the juror was forced to explain her story about the verdict in front of a full courtroom compounded the situation defense counsel tried to prevent when he told the judge that it looked like Juror Cody was "very uncomfortable," wanted to talk to the judge, there was three rows of victims' family in front of the courtroom, and was "concerned with her [Juror Cody] timidness and this is the juror that I think was looking down doing the verdict," whereby the Court stated, "right." (ROA, p. 1830)

Defense counsel further that based on the aforementioned factors, "I think that's highly prejudicial to her and I don't know if the State objects to maybe going into chambers or something . . . I'm concerned that would prejudice Mr. Simpson." (ROA, pg. 1830) This was a death case, a juror told the court a verdict of guilty was not her verdict, a plethora of the victim's family were present during said admission, and the fact that the jury had not proceeded to the penalty phase. Such error cannot be considered harmless. Lastly, a conclusive determination of whether an external or overt force was driving Ms. Cody will never be answered, as she was not allowed to speak freely and was not granted her request to speak with the judge and counsel in private.

Defendant did not receive a fair trial as a result of the trial court failing to exclude the public from the courtroom, and the inaction by the trial court jeopardized Appellant's right to a fair trial as the probability of prejudice to defendant outweighed the right to the press to be there. This error was in violation of Appellant's Fifth, Sixth, Fourteenth Amendment and Due Process Rights of the U.S. and Florida Constitutions.

Moreover, Appellant waived his right to a public trial through counsel, and despite same, no inquiry was made by the trial court utilizing either the test in *Waller* or the lesser test by the Eleventh Circuit, and no inquiry was done as to the probability of prejudice to Appellant. In fact, the court mistakenly believed it was without authority to grant such a request. (ROA, pg. 1830).[7]

In conclusion, Appellant requests this Court to reverse and remand his case for a new trial, as the denial of defense counsel's request for a closed courtroom during Juror Cody's testimony was in violation of Appellant's Fifth, Sixth, and Fourteenth Amendment rights under the U.S. and Florida Constitutions.

ARGUMENT THREE

THE TRIAL COURT ERRED IN ALLOWING THE JURY TO PROCEED TO THE PENALTY PHASE OF APPELLANT'S TRIAL

[7] It appears that the State did not object to said request for a closure.

AFTER HEARING TESTIMONY FROM A JUROR THAT THE PREVIOUS GUILTY VERDICT WAS NOT HERS. ALLOWING THE JURY TO PROCEED WITH THE PENALTY PHASE WAS IN VIOLATION OF APPELLANT'S FIFTH, SIXTH, AND FOURTEENTH AMENDMENT RIGHTS OF THE U.S. CONSTITUTION AND FLORIDA CONSTITUTIONS

Given the facts above, and the trial court's allowance of the juror to proceed to the penalty phase when a juror expressed sincere doubt as to the verdict of guilty, it was error for the trial court to force the juror to go forward with the penalty phase of the trial without fully resolving the issue of the juror and their apparent disagreement with the verdict.

Allowing the jury to go forward to the penalty phase (which came back with a recommendation of death), allowed the jury to succumb to internal influences and as one court put it, having an "incalculable and irreversible" effect of exposing the jury to improper influences. *See People v. Bonillas*, 48 Cal. 3d 757. Juror Cody (and other unnamed jurors Ms. Cody stated whom also had doubts as to the guilty verdict) were forced to decide Appellant's fate in the penalty phase before her/their doubts about the guilt phase came to a close. This effectively forced Ms. Cody into having to find Appellant guilty, and solely rely on evidence in the penalty phase to make an independent determination of life or death.

Moreover, by sending the jurors to the penalty phase of the trial (without further questioning of Ms. Cody and/or other jurors as to the

validity of the verdict), the trial court impermissibly forced the jury into suppressing their doubts of guilt into a finding of guilt, subsequently rending a recommendation for death. The court impermissibly reduced the probably of a recommendation of life as it took up the verdict issue again after the death recommendation was given. In essence, the jury was forced to give up the idea that the defendant was innocent and proceed to a phase where the only evidence considered was aggravation and mitigation, and the jurors were then introduced to Appellant's prior record,[8] thereby introducing them

[8] As listed in the statement of case and facts, Appellant introduced one statutory mitigator at sentencing, specifically the Age of the Defendant at the time of the Crime pursuant to Fla. Stat. 921.141(6)(g). The Court considered all mitigation evidence jointly as to Counts One and Two in the sentencing order, and gave no weight to the lone statutory mitigator presented in determining the sentence of the defendant. Non-statutory mitigation evidence was presented by counsel in the form of two memorandums that introduced a total of eighteen (18) non-statutory mitigators for the courts consideration.

Specifically, 1) The Deaths were Relatively Swift. The trial court held that this non-statutory mitigator was not proven and gave it no weight in determining the sentence. 2) Defendant Cooperated with Law Enforcement in Prior Case (Durrance/Crooks). This mitigator was held to be proven and was given considerable weight in considering the sentence of defendant. 3) Defendant Cooperated with Law Enforcement in *State v. Wright*, 1998. The court held that this mitigator was not proven and assigned no weight in considering the sentence. 4) Abusive and Deprived Childhood. The court held this mitigator was proven and gave it slight weight in considering the defendant's sentence. 5) Exposed to Alcoholism in Family. The court held that this mitigator was proven and gave it slight weight in considering the sentence of defendant. 6) Unstable Home Environment. The court held this mitigator was proven and gave it slight weight. 7) Absence of a Role Model. The court held this mitigator unproven

to something they would not have heard if they were allowed to sort out the guilty verdict issue before the beginning of the penalty phase. The introduction of prior crimes of a defendant has been found to be largely prejudicial to a defendant in guilt phase trial. *See* *Billie v. State*, 863 So. 2d 323 (Fla. 3rd DCA 2003), *Lazarowicz v. State*, 561 So. 2d 392 (Fla. 3rd DCA 1990), *Tillman v. State*, 647 So. 2d 1015 (Fla. 4th DCA 1994)

In the instant case, the trial court's decision to send the jury to the penalty phase thereby letting the jury hear information about Appellant's criminal past is one and the same of allowing such prejudicial evidence to be introduced into evidence in defendant's guilt phase. Moreover, it cannot be said that after hearing about all of Appellant's aggravation, Jury Cody's

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and therefore assigned it no weight in determining sentence. 8) Addiction to Drugs and Drug Abuse. The court held this mitigator was proven, but assigned it little weight in determining sentence. 9) Previous Completion of Substance Abuse Program. The court held that this mitigator was proven, but assigned it little weight. 10) Charitable and Humanitarian Deeds. The court held this mitigator was proven, but assigned it little weight. 11) Personal Accomplishments (GED/Lundeburg School/FFCJ) The court found this mitigator proven and assigned it slight weight in determining sentence. 12) Artistic Talent. The court held this mitigator proven, but assigned it little weight. 13) Respect to Elders and Family. The court found this mitigator proven, but assigned it little weight. 14) Family and Friends that Love Him. The court held this mitigator proven and assigned it slight weight. 15) Society can be protected by a sentence of Life. The court held this mitigator proven, but gave it no weight in determining sentence. 16) Religious Faith. The court held this mitigator proven and assigned it slight weight. 17) Defendant's Courtroom Behavior. The court held this mitigator proven and assigned it slight weight. 18) Suicide Attempts by Defendant. The court held this mitigator proven and assigned it slight weight in determining sentence.

initial testimony had she thought Appellant was not guilty, she again changed her mind to guilty after hearing about more violent and crimes unrelated to the guilt phase crime.

In conclusion, Appellant request this court to reverse and remand this case for the new trial, as Appellant's Fifth, Sixth, Fourteenth Amendment, and Due Process rights under the U.S. and Florida Constitutions were violated as the result of the trial court allowing the jury to move to the penalty phase without fully questioning the jurors about their doubt as to Defendant's guilt as to the guilt phase.

ARGUMENT FOUR

THE TRIAL COURT ERRED IN NOT GRANTING APPELLANT'S MOTION FOR A JURY INTERVIEW WHEN A JUROR ON APPELLANT'S CASE RECANTED HER PREVIOUS GUILTY VERDICT BEFORE THE JURY PROCEEDED TO THE PENALTY PHASE OF APPELLANT'S TRIAL. SAID ERROR WAS IN VIOLATION OF APPELLANT'S FIFTH, SIXTH, AND FOURTEENTH AMENDMENT RIGHTS OF THE FLORIDA AND U.S. CONSTITUTIONS.

Using the facts given above, it is clear that defense counsel requested both an oral and a written motion to interview the jurors in the instant case, and both motions were denied. (ROA, pgs. 1828, 1983; written motion at pgs. 824-843) The oral motion was based on the fact(s) that Juror Cody said the verdict of guilty was not her individual verdict, and when asked that during the deliberation, and weighing all the evidence and taking into the

consideration and viewpoints of the other jurors, the jury deliberations and weighing was not the reason she came back with a verdict of guilty. (ROA, p.g 1838) Juror Cody stated that her verdict of guilty was because she "knew it had to be a unanimous decision and the (sic) they also – my understanding was I needed to look at the physical evidence not take into consideration everyone's testimony as well."

As to the second Motion for Jury Interview, defense counsel asked for the jurors to be interviewed, presumably under the Fla. R. Crim. Pro. 3.575.[9] In that motion defense counsel stated that there was jury confusion, some questions left unanswered before the verdict was made, and other unnamed jurors shared in the confusion and/or opinion of Ms. Cody, and that fundamental fairness, due process and the interests of justice require further inquiry of Juror Cody and other "un-named" juror who share her opinion. (ROA, pg. 824-43).

In denying said written motion for jury interview, the trial court held that "all of Juror Cody's statements and allegations fall within the matter which inhere in the verdict itself. *Devoney v. State*, 717 So. 2d 501 (Fla. 1998). The trial court further held that juror Cody expressed her thoughts,

[9] Defense counsel's written motion for jury interview was titled, "Motion for Individual and Sequestered Jury Interview, pursuant to "the applicable Florida Rules of Criminal Procedure." (ROA, pg. 824-43)

impressions, reasoning and rationale for her verdicts, and her comments did not reveal any improper external influence, but instead, showed improper, normal, jury deliberations and thought process. (ROA, pg. 860-67)

The Due Process Clause of the Fourteenth Amendment guarantees the right of state criminal defendant's to be tried by an impartial jury. The Fourteenth Amendment right incorporates the essence of the Sixth Amendment right to be tried "by a panel of impartial, indifferent jurors whose verdict must be based upon the evidence developed at the trial." *Irvin v. Dowd*, 366 U.S. 717 (1961).

The trial court abused its discretion by not allowing counsel to informally interview Juror Cody and the other unnamed jurors. Fla. R. Crim. P. 3.575 does not require the filing of sworn affidavits in order to interview a juror. All that is required under said rule is a statement of reasons why the verdict may be subject to challenge. *Pozo v. State*, 963 So. 2d 831 (Fla. 4th DCA 2007). [*Holding that the trial court erred in denying the motion to interview the jurors because it was clear that defendant's motion presented a season to believe the jury verdict was subject to challenge, as after the verdict a juror wrote to the trial judge stating that during jury deliberations the sheriff's office (who were clearly identified at trial) might harass the jurors if they returned a not guilty verdict, and that she felt pressured to vote*

"guilty."]; See People v. Sheldon (156 N.Y. 268); *People v. Faber*, 199 N.Y. 256) [*Every attempt to drive men into an agreement, which they would not have reached freely, is a perversion of justice. No juror should be induced to agree to the verdict by a fear that a failure to so agree would be regarded by the public as reflecting upon either his intelligence or his integrity. It must not be overlooked that jurymen act as individuals and they must decide a case upon their own opinion.]* The law does not permit a juror to avoid his verdict for any reason which essentially inheres in the verdict itself, as that he did not assent to the verdict; that he misunderstood the instructions of the court, the statements of witnesses or pleadings in the case; that he was unduly influenced by the statements or otherwise of his fellow jurors, or mistaken in his calculations or judgment, or other matters resting alone in the juror's breast. *Travent, LTD v. Schecter*, 678 So. 2d 1345 (Fla. 4th DCA 1996).

However, jurors are allowed to testify about overt acts which might have prejudicially affected the jury in reaching their own verdict. *Id.* Such overt acts include but are not limited too: appeals to racial, ethnic, or religious bias made openly among the jurors; a type of agreement reached by two or more jurors to disregard their oaths as jurors or to ignore the law;

whether extraneous prejudicial information was improperly brought to the jury's attention, etc. *Id.*

It was clear in the questioning of Juror Cody that there was the appearance of improper external influence or an overt act by the jurors to render a jury interview proper. The following facts from Juror Cody illustrate this fact. (1) Juror Cody also said some people feel he's guilty and some people don't." (ROA, pg. 1833) (2) The Juror further said "that the way it [the evidence] was explained to them was the evidence went is the physical evidence." (ROA, pgs. 1834-35) (ROA, pg. 1836) (3) Juror Cody also answered "no" to the question that was the guilty verdict your individual verdict based on what you heard. (ROA, pg. 1836) (4) When asked that during the deliberation, and weighing all the evidence and taking into the consideration and viewpoints of the other jurors, the jury deliberations and weighing was not the reason she came back with a verdict of guilty. (ROA, pg. 1838) (5) Juror Cody's timidness and asking the judge to speak to him in private (6) Defense counsel's observations that counsel believed Juror Cody was feeling very uncomfortable, and obviously wanted to talk with the Judge, and that there were three rows of the victim's family in the front of the courtroom. (ROA, pg. 1829) The Judge declined to exclude anybody from the court proceedings, whereby again defense counsel

stated he was "concerned with her [juror Cody] timidness and this is the juror that I think was looking down doing the verdict." The Court stated, "right." (ROA, p. 1830)

More importantly, the Judge himself never inquired into whether the jurors were subject to improper external influences or an overt action was made by a juror, and compounded the issue by allowing the public (and three rows of the victim's family) to remain in the court while Juror Cody testified as to the verdict not being hers. (ROA, pg. 1829) By sending the jury to begin the penalty phase without a full examination of the now apparent unanimity in the verdict, the trial court's error in not granting an interview cannot be considered harmless.

In conclusion, Appellant asks this Court to reverse and remand the instant case for a new trial, as the trial court's denial of a jury interview as an abuse of discretion, and given the severity of this death case and the fact that a juror stated on the record that the verdict of guilty was not her own before the start of the penalty phase, the error cannot be considered harmless.

ARGUMENT FIVE

THE COURT ERRED BY NOT MAKING A DEFINITIVE RULING ON APPELLANT'S "MOTION FOR PRE TRIAL RULING ON ADMISSIBILITY OF "REVERSE" WILLIAMS RULE EVIDENCE", THEREBY NOT ALLOWING DEFENSE COUNSEL TO ADDRESS RELEVANT IMPEACHMENT INFORMATION PERTAINING TO

STATE WITNESSES WHICH PREJUDICED APPELLANT AT TRIAL

Defense counsel, in a pre-trial motion, moved for the court to rule on the admissibility of Reverse Williams Rule evidence pertaining to numerous potential State witnesses including George Durrance and Archie Crook Jr.

Florida Statute 90.904 (2)(a) states that *"similar fact evidence of other crimes, wrongs, or acts is admissible when relevant to prove a material fact in issue, including, but not limited to, proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absences of mistake or accident, but is inadmissible when the evidence is relevant solely to prove bad character or propensity."* Case law on this subject is limited, but it is generally held that the trial court is to conduct a probative versus prejudicial weighing analysis pursuant to Fla. Stat. 90.403 in connection with a decision under the *Williams* rule. *See State vs. Storer* 920 So. 2d 754 (Fla. 2d DCA 2006); *Rivera v. State*, 561 So. 2d 536, 539 (Fla. 1990); *Moreno v. State*, 418 So. 2d 1223, 1225 (Fla. 3d DCA 1982); *Brown v. State*, 513 So 2d 213, 215 (Fla. 1st DCA 1987); *State v. Savino*, 567 So. 2d 892, 894 (Fla. 1990); *see also Drake v. State*, 400 So. 2d 1217, 1219 (Fla. 1981)

The defense planned to argue that State witnesses were known associates of Appellant around the time of the incident, that they resided at the same residence, were all involved in the drug trade, and that the listed

witnesses committed robbery and home invasion crimes together wearing apparel that was similar to the clothing articles found near the crime scene, and eventually linked to the murders. It was shown at trial that DNA evidence found on the clothing did not exclude Archie Crook, Jr. as being a contributor to the DNA found on the sweatpants taken into evidence found near the church. (ROA pg. 1251)

The order pertaining to Appellant's motion was never ruled on or signed by the trial judge, as evidenced in the ROA exhibit at pg. 725. Defense counsel at trial was unable to address relevant and pertinent information pertaining to the prior crimes and acts of State witnesses because of the fact that the trial court did not conduct the required probative versus prejudicial weighing test, nor did counsel receive any ruling or guidance from the trial court as to the status of the motion presented pre-trial. Therefore, Appellant requests a new trial.

ARGUMENT SIX

THE STATE COMMITTED PROSECUTORIAL MISCONDUCT IN THE GUILT AND PENALTY PHASE CLOSING ARUGMENTS AT TRIAL. THE STATEMENTS MADE BY THE PROSECUTION CONSTITUTED FUNDAMENTAL ERROR AND APPELLANT IS ENTITLED TO A NEW TRIAL

When counsel fails to object to alleged improper statements made by the State during closing arguments, the improper prosecutorial comments are

not cognizable on appeal absent a contemporaneous objection. Urbin v. State, 714 So.2d 411 (Fla. 1998). However, the exception to said procedural bar is where the comments constitute fundamental error, defined as error that reaches down into the validity of the trial itself to the extent that a verdict of guilty could not have been obtained without the assistance of the alleged error. Id. *See also* Ross v. State, 726 So.2d 317 (2nd DCA 1998), [*Holding that because of the prosecutor's improper closing arguments and the defense counsel's failure to object them a new trial was proper because,* "*the Sixth Amendment right to counsel exists in order to ensure the fundamental right to a fair trial*."];

In the instant case, the prosecutor's comments made in closing arguments at trial made the proceedings presumptively unreliable and unfair. Therefore, a new trial should be granted because a verdict of guilty would not have been obtained without the assistance of the alleged error. *See* Bonifay v. State, 680 So. 2d 413 (Fla. 1996)

Specifically, the State attempted to inflame the minds and passions of the jury by creating an imaginary script when it stated in closing arguments in guilt and penalty phases that the defendant, "struck blow after blow until he left their lifeless and bleeding bodies gurgling on the floor." (ROA pgs. 1591, 1938) Florida case law has held this type of imaginary script

argument to be improper for over sixty years. In *Urbin v. State,* 714 So 2d 411 (Fla. 1998) the Florida Supreme Court condemned the prosecution's conduct when it stated that it "*went far beyond the evidence in emotionally creating an imaginary script demonstrating the victim was shot while pleading for his life*." *Id*., and whereby the prosecution was trying to unduly create, arouse, and inflame the sympathy, prejudice, and passions of the jury to the detriment of the accused. *Id*. *Barnes v. State*, 58 So.2d 157 (Fla. 1951), *Garron v. State*, 528 So. 2d 359 (1988).

The State made improper comments on the evidence during the closing arguments of the guilt phase, stating "their blood [the victims] speaks to the truth about who it was that wielded that axe inside the bedroom." (ROA pg. 1593) Appellant's DNA was not found on the axe nor anywhere at the crime scene. (ROA pgs. 1108-1161) Additionally, the state implied that Archie Crook, Jr. was eliminated as a suspect (ROA pg. 1597) when in fact his DNA was never excluded as being a contributor to stains found on the sweatshirt collected as evidence. (ROA pg. 1251) This statement was made in an effort to mislead the jury as to the facts of the case as presented at trial.

The State continued to misstate the evidence when it stated in closing arguments that the shoes found near the church belonged to Appellant.

(ROA pg. 1622) No evidence was produced at trial linking Appellant to the shoes in evidence. This false statement was made in an attempt to persuade jurors to convict for reasons other than those shown by evidence.

The State continued misleading the jury regarding the DNA evidence in closing arguments by stating that the DNA evidence showed that Appellant was the last to wear the clothes found at the church and linked to the crime scene. (ROA pg. 1622) State DNA witnesses clearly state that DNA testing cannot be used to determine the date of when it was transferred to the clothing or evidentiary item in question. (See testimony of state DNA expert witnesses in ROA pgs. 1008-1251)

All of these improper comments on the evidence were in direct violation of the prosecution's code of ethics. *See* Goddard v. State, 143 Fla. 28 (Fla. 1940) [*Holding that,* "*it is well established that the State should seek justice, not a conviction unfairly obtained. No conviction is warranted except upon convincing evidence fully and fairly presented*."]. Additionally, the examples of improper comments on the evidence as cited above are all in violation of the rulings found in both the *Urbin* and *Brooks v. State*, 762 So. 2d 879, rulings

The State attempted to bolster the credibility of its witness by stating that George Durrance was "honest and forthright" with his testimony. (ROA

pgs. 1607, 1637); that he was "smart"; and that he was "credible" (ROA pg. 1608). This statement was made in spite of evidence showing that Durrance delayed reporting his alleged knowledge of the confession of Appellant for two years after the time of the murder, and then only after he was made aware that Appellant was working with law enforcement to convict him. (ROA pgs. 891-93) Durrance also stated that he would willingly lie under oath in order to reduce his sentence. (ROA pg. 898) *See* Gorby v. State, 630 So. 2d 544 (Fla. 1993), [Holding "*It is improper to bolster a witness' testimony by vouching for his or her credibility*."]

The State made an improper attack on Appellant's character when it implied Appellant was "betraying a friend" [i.e. George Durrance] by assisting law enforcement to remove a drug dealer from the street who was eventually convicted of seven drug related felonies and sentenced to 32 years in prison. (ROA pg. 1607) Additionally, the State implied that Appellant was a "liar," and that he lied to detectives when asked about his knowledge of the victims. (ROA pgs. 1617, 1636, 1642) Appellant clearly testified that detective Bialkowski initially said "Crews" and not "Crooks" when asked about the murders in an effort to throw him off, and that he stated he did know the victims when told the correct name by detectives. (ROA pgs. 1427-29)

The State continued, implying that Appellant denied that the clothes found near the church were his (ROA pg. 1636) when in fact it was freely admitted by the defense that the clothes belonged to Appellant, and that Archie Crook, Jr. borrowed the clothes from Appellant prior to the murder. (ROA pgs. 519, 1388, 1656) These examples are in direct violation of established Florida law. *See* *Pacifico v. State*, 642 So.2d 1178 (Fla. 1994) (holding that when the case against a Defendant is weak or tenuous, a prosecutor's contentions that the Defendant is a liar could rarely, if ever, be construed as harmless error).

In sum, as held in the *Urbin* and *Garron* decisions, "these considerations are outside the scope of the jury's deliberation and their injection violates the prosecutor's duty to seek justice, not merely 'win' a death recommendation." *Id*. Further, as held in *Urbin* and *Garron*, misconduct by prosecution in the instant case are verbatim examples of what the Florida Supreme Court has previously prohibited and ruled as fundamental error from closing statements. In light of the arguments made by the prosecutor, and defense counsel's failure to object, there is a reasonable probability the outcome of Defendant's case would have been different. The fundamental error created by the prosecution in Appellant's

case allowed the jury to convict Appellant for reasons other than his alleged guilt. Therefore, Appellant requests that a new trial be granted

CONCLUSION

Wherefore, Appellant respectfully requests this Honorable Court to reverse his convictions and sentences, granting both a new guilt and penalty phase of trial free of the prejudicial issues as presented in this brief.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been sent via U.S. Mail to all counsel of record, on this ___ day of December, 2007.

RESPECTFULLY SUBMITTED,

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CERTIFICATE OF COMPLIANCE AND AS TO FONT

I HEREBY CERTIFY that this brief is submitted by Appellant, using Times New Roman, 14 point font, pursuant to Florida Rules of Appellate Procedure, Rule 9.210. Further, Appellant, pursuant to Florida Rules of Appellate Procedure, Rule 9.210(a) (2), gives Notice and files this Certificate of Compliance as to the font in this immediate brief.

Respectfully submitted,
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