IN THE SUPREME COURT OF FLORIDA

DONALD JAMES SMITH,

Appellant,

Case No.: SC18-822
L.T. No.: 16-2013-CF-005781

v.

STATE OF FLORIDA,

DEATH PENALTY—DIRECT APPEAL

Appellee.
_____/

APPELLANT'S INITIAL BRIEF

On Appeal from the Circuit Court, Fourth Judicial Circuit, in and for Duval County, Florida
Honorable Mallory D. Cooper Presiding

By: H. KATE BEDELL
LAW OFFICES OF BEDELL & KURITZ
200 E Forsyth Street
Jacksonville, Florida 32202
Telephone: (904) 355-1999
E-Mail: kate@kuritzlaw.com
Secondary E-Mail: contact@kuritzlaw.com
Florida Bar No.: 0632457

Counsel for Appellant

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INTRODUCTION

The facts of this case are horrifying. A nearly 60-year-old man took advantage of the mother of an 8-year-old girl, snatched the child away under the cover of darkness, and then brutally vaginally and anally raped and murdered her. Within a month of arresting Mr. Smith, the State noticed its intention to seek the death penalty. The media attention was swift, immediate, and relentless. In one of the most emotionally charged cases possible—the brutal murder of a child—the media attention remained omnipresent through the years.

Mr. Smith's defense counsel, anticipating the difficulty of receiving a fair trial in Duval County, Florida, filed a motion to change venue more than two years before a jury was selected. This motion was denied. The trial court's ruling to deny this motion was reversible error. Additionally, other rulings by the trial court deprived Mr. Smith of a fair trial.

These other errors include the denial of Mr. Smith's motion for mistrial when the chief medical examiner began to cry on the stand while looking at graphic photographs of the child's autopsy, and the error of denying Mr. Smith's motion to exclude these graphic photographs in the first place. These errors were only reinforced and compounded by the inappropriate comments made by the prosecutor during the State's opening and closing.

As discussed in more detail below, Mr. Smith's conviction and sentence should be reversed. He is entitled to a new trial, and he is entitled to this Court's reversal of his death sentence.

STATEMENT OF THE CASE

On June 22, 2013, Mr. Smith was indicted by the grand jury of Duval County, Florida, for the kidnap, sexual assault, and murder of eight-year-old Cherish Perrywinkle, in violation of sections 787.10(3)(a), 794.011(2)(a), and 782.04(1)(a), Florida Statutes.[1] R. Vol. I, p. 18-20. After Mr. Smith was indicted, the State filed its Notice of Intent to Seek Death Penalty and Request for Statement of Particulars of Mental Mitigation. R. Vol. I, p. 28. The State later noticed six aggravating factors.[2] R. Vol. I, p. 1256. Mr. Smith noticed the State regarding his various mental mitigation factors. R. Vol. I, p. 1423-24.

[1] The record consists of three volumes as well as several discs. Volume one of the record consists of 4,058 pages. Volume two of the record consists of 2,234 pages. Volume three of the record consists of 626 pages. References to the record are cited, for example, as follows: R. Vol. I, p. 101, with 101 referring to the page number. The brief includes a summary of the juror questionnaire responses completed by the individuals selected to sit for the jury. These responses are captured as Appendix A.

[2] These six aggravating factors are: 1) the defendant was previously convicted of a felony involving the use or threat of violence to a person; 2) the murder was committed while the defendant was engaged in the commission of a kidnapping and sexual battery; 3) the murder was committed for the purpose of avoiding or preventing a lawful arrest; 4) the murder was especially heinous, atrocious or cruel; 5) the murder was committed in a cold, calculated and premeditated manner without a pretense of moral or legal justification; and (6) Cherish Perrywinkle was less than 12 years of age. §§ 921.141(b), (d), (e), (h), (i), and (l)).

Mr. Smith's trial began on February 5, 2018. R. Vol. II, p. 4. On June 21, 2013, Mr. Smith approached Cherish Perrywinkle, along with her mother, Rayne Perrywinkle, and sisters, after he saw them shopping for clothing in a Dollar General Store. R. Vol. II, p. 1033-36. Mr. Smith gained the trust of Rayne Perrywinkle by promising to buy clothing for Cherish Perrywinkle and her sisters at Wal-Mart. R. Vol. II, p. 1038-44.

Mr. Smith drove them to the Wal-Mart and waited for over an hour before taking Cherish Perrywinkle away from her mother by promising to buy her cheeseburgers at the McDonald's in front of the store. R. Vol. II, p. 1056-57. Once in front of the store, Mr. Smith left with Cherish Perrywinkle in his van. R. Vol. II, p. 1112-14. After leaving the Wal-Mart, Mr. Smith sexually assaulted Cherish Perrywinkle. His DNA was found on and in her body, and her DNA was found on his body. R. Vol. II, p. 1325-60. Mr. Smith then hid her body in a creek, under a log and other debris.

Cherish Perrywinkle was reported missing. R. Vol. II, p. 1060. Mr. Smith and his van were described in this report. R. Vol. II, p. 1061-72. After an officer spotted his van, he was stopped and apprehended. R. Vol. II, p. 1180-85. Based on a report from another individual who noticed Mr. Smith's vehicle near the edge of the woods, Cherish Perrywinkle's body was found the next morning. R. Vol. II, p. 1192-97.

Following the State's presentation of evidence, the defense elected to not present a case, and, thus, rested. R. Vol. II, p. 1403. On February 14, 2018, the jury returned a verdict of guilty as charged. R. Vol. I, p. 2889-92. Thereafter, on February 20, 2018, the case proceeded to the penalty phase. R. Vol. II, p.1488. After additional aggravation was presented by the State, R. Vol. II, p. 1531-38, Mr. Smith offered mitigation evidence, R. Vol. II, p. 1547-1764, and the jury returned its additional findings. R. Vol. II, p. 2988-3012. The jury found the State had proved the existence of all six aggravating factors beyond a reasonable doubt, R. Vol. I, p. 2988-3012, and the jury rejected all but two mitigating factors offered by Mr. Smith. R. Vol. I, p. 2990; 3003.

Thereafter, Mr. Smith and the State filed various post-trial motions and memoranda. R. Vol. I, p. 3032-35; 3054-59. The trial court denied Mr. Smith's motion for new trial. R. Vol. I, p. 3037. Mr. Smith, although presented with the opportunity, did not present any evidence at the *Spencer*[3] hearing. R. Vol. II, p. 2220. Thereafter, on May 2, 2018, the trial court sentenced Mr. Smith to death. R. Vol. I, p. 3081-89; 3113-3145. On May 23, 2018, Mr. Smith filed a timely notice of appeal. R. Vol. I, p. 3146. This direct appeal follows.

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

STATEMENT OF THE FACTS

I. Underlying Procedural Facts Particularly Relevant to Issues Raised

A. Media Interest in the Case

The media was omnipresent in this case, as even the trial court acknowledged. R. Vol. I, p. 1206 ("This Court also notes it has observed the print and broadcast media in attendance at nearly every hearing conducted in Defendant's case."). As an example of the voracious nature of the media interest in this case, when the defense sought a protective order to limit the public release of potentially sensitive discovery it had not yet received, but was notified would include inculpatory recorded statements made by Mr. Smith while in custody, R. Vol. I, p. 1007-08, representative from the media sought to intervene in the case. R. Vol. I, p. 1088-1122. The media sought access to this pretrial discovery at the same time the defense would receive it. R. Vol. I, p. 1088-1122. Following the media's request through its legal counsel, and argument, R. Vol. I, p. 3642-74, ultimately, the trial court relented. R. Vol. I, p. 1199-1215.

The trial court released the requested information in a redacted form, even though it recognized Mr. Smith's repeated concerns that he could not receive a fair trial if these recordings were released. R. Vol. I, p. 1204-05. The trial court ultimately authorized the release of redacted versions of the jail recordings wherein

Mr. Smith makes inculpatory statements to include statements regarding Cherish Perrywinkle's body. R. Vol. II, p. 1206-07.

B. Mr. Smith's Pretrial Motions

Throughout the nearly five years of litigation prior to trial, Mr. Smith's counsel filed a myriad of pretrial motions. Some of these motions related to, at the time, the unresolved and pending *Hurst*[4] matter. However, the following three motions were filed, argued, and ruled on by the trial court prior to trial are raised now as some of the bases for reversing Mr. Smith's conviction and sentence.

1. Motion to Change Venue

On November 4, 2015, Mr. Smith filed his amended motion to change venue. R. Vol. I, p. 939-966. This motion was filed nearly two years prior to jury selection commencing. R. Vol. I, p. 939-966; 3579-3601. In this motion, Mr. Smith requested a change of venue to ensure that his Sixth Amendment right to a fair and impartial trial was protected, because the media coverage since 2013 had been "overwhelmingly negative for Mr. Smith." R. Vol. I, p. 939, R. Vol. I, p. 958-61. In support of this motion, Mr. Smith outlined only some of the news reports, commentary, and social media postings about the facts of the case, as well as his own past criminal history. R. Vol. I, p. 939-57.

[4] *Hurst v. State,* 202 So. 3d 40 (Fla. 2016).

The number of news stories numbered into the hundreds and thousands across the various news networks. R. Vol. I, p. 940. News outlet across the State of Florida, nationally, and internationally had run stories regarding this case. R. Vol. I, p. 940. Mr. Smith argued that each of these stories had various themes, which included conclusions that Mr. Smith was guilty,[5] R. Vol I, p. 941-42, that he was someone to be "on guard" against when around children, 942-44, and that he has a long criminal history. R. 943-44. Some of the reported commentary at the time included a "crime expert" on the news stating: "This incident is all over the map now, it's gone viral, because of the heinous act by Mr. Smith,"[6] and "The way he murdered this child, and then tried to conceal her body, is sickening."[7] R. Vol. I, p. 941.

Mr. Smith's motion laid out that the news reports additionally made every effort to tell "its audience anything and everything negative about Mr. Smith's past, without presenting Mr. Smith's side of the story." R. Vol. I, p. 942. These stories included almost "nightly" news reports the "emphasized Mr. Smith's sex crime convictions in 1977, 1992, and 2009." R. Vol. I, p. 944. Following a report

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[5] Reporter stating: "He would have been kept civilly committed indefinitely, instead of being in a Wal-Mart where he kidnapped Cherish." *Sex Offender Should Have Been Behind Bars,* WJHG NEWS (June 24, 2013, 6:39 PM).

[6] *The Abduction and Killing of Cherish Perrywinkle*, News 4 Jax (June 30, 2013).

[7] *Evidence Released in Murder Case Against Donald Smith,* NEWS 4 JAX (Oct. 28, 2013, 7:25 PM).

regarding his criminal history, many news segments would include an "'expert' on the air to help 'review' Mr. Smith's criminal history." R. Vol. I, p. 944-45.

The motion recounted the immense exposure the community had to this case to demonstrate the bias "on behalf of the entire area" against Mr. Smith. R. Vol. I, p. 947. In a report titled, "Community in Mourning," it was stated that "the outpouring of support has been constant. I'm told it has only brought this tight knit community closer." R. Vol. I, p. 947. As another reporter recounted, "When Cherish Perrywinkle was abducted and found dead, the whole community wept. Most didn't know the 8-year-old girl, but so many wanted to help." R. Vol. I, p. 947-48.

Eighteen to nineteen hundred people reportedly signed the guest book at Cherish Perrywinkle's viewing, and her funeral was televised live for all of Jacksonville.[8] R. Vol. I, p. 948. The reporting also included statements and arguments that the "system" had let people down, because Mr. Smith's should never have been released from prison in light of his prior crimes. R. Vol. I, p. 949-52.

Mr. Smith argued in his motion that this coverage inevitably lead to the media providing an indoctrination of the State's theory to the broader Jacksonville community.[9] R. Vol. I, p. 952. This included reporting that "DNA evidence links

[8] *Uncut: Funeral Service for Cherish Perrywinkle,* NEWS 4 JAX (June 28, 2013, 5:42 PM).

[9] *Flood of Documents in Cherish Perrywinkle Case Offers Graphic Look at the State's Evidence,* FIRST COAST NEWS (Oct. 29, 2013, 2:54 PM).

Donald Smith to Cherish Perrywinkle and 'what that means' for the case … [is that] 'Investigators found Mr. Smith's DNA all over Cherish's body, and the likelihood that it is some else's, is 35 quintillion to 1.'" R. Vol. I, p. 952-53.

Additionally, the news media reported on inculpatory statements made by Mr. Smith to his mother while in custody. R. Vol. I, p. 954. At the time, he asked his mother to "get him a DS M-4 Book, a book that highlights psychiatric problems" because "Mr. Smith said he would use that to find out what level he needs to qualify for treatment." R. Vol. I, p. 954.

When discussing Mr. Smith's possible defenses in the case, the medial was completely one-sided. Specifically, commentators reported that Mr. Smith's potential alibi defense would fail. R. Vol. I, p. 954. Additional news reports further described Mr. Smith as a "monster," "pure evil," and that the State needed to "electrocute him." R. Vol. I, p. 955-56. Outside of the media, other sources, including blogs and social media platforms, made clear that the public sentiment in the Jacksonville area was that Mr. Smith was guilty and should be put to death. R. Vol. I, p. 956-57.

At the hearing, Mr. Smith's counsel argued that what is evident from the pretrial publicity, was not just that Mr. Smith was guilty, but also the only appropriate sentence would be death. R. Vol. I, p. 3584-85. Although many of the articles cited were from 2013, Mr. Smith's counsel argued, in 2015, the same themes

were ongoing and evident in social media posts. R. Vol. I, p. 3585-86. Ultimately, Mr. Smith's counsel argued that "we can presume that the overwhelming indoctrination of this community has to be to prejudice my client prior to any facts actually being proved by the State of Florida and, additionally, that the only appropriate penalty is the death penalty." R. Vol. I, p. 3587-86.

In response, the State cited to *Rolling v. State*, 695 So. 2d 278 (Fla. 1997), and argued that a change of venue was not required. R. Vol. I, p. 3589-91. Amongst other arguments, the State argued that, "we may be premature at this juncture in even ruling on this motion before we even try to select a jury in Duval County." R. Vol. I, p. 3589-91. However, the State conceded that if the parties did attempt to pick a jury, and failed, "we're sort of in a catch-22. There is realistically no good solution, no perfect solution" because there would then be a built-in delay. R. Vol. I, p. 3595-96. At the hearing, the trial court reserved ruling on the motion. R. Vol. I, p. 3597, but reserved ruling on the motion, subject to first attempting to pick a fair and impartial jury in Duval County, Florida. R. Vol. I, p. 3613. However, this motion was ultimately denied.

2. Mr. Smith's Motion in Limine Regarding Autopsy Photographs

In Mr. Smith's Eighth Motion in Limine, he moved to prevent the State from offering autopsy photographs of Cherish Perrywinkle. R. Vol. I, p. 1449-1451.

Specifically, Mr. Smith argued that it would be error to admit these photographs because each was so graphic. R. Vol. I, p. 1449-50. These photographs depicted a naked child with severe injuries to her vagina and anus, as well as skin removed from the front of her throat to show deep bruising around the trachea. R. Vol. I, p. 1449-50. The probative value was substantially outweighed by the prejudicial effect because, to show these images to the jury, would "shock" them and "inflame their passions." R. Vol. I, p. 1450. Additionally, because the medical examiner would testify to the injuries at issue, the photographs were cumulative. R. Vol. I, p. 1450.

In response, the State argued in its motion that the probative value of the photographs outweighed any prejudice because each photograph revealed the cause of death, the location of the victim's wounds, and the victim's identity. R. Vol. I, p. 1467-1472. Additionally, the State argued the photographs were not cumulative because the test for admissibility is relevance rather than necessity, and the photographs would assist the medical examiner in her testimony. R. Vol. I, p. 1467-72. Following argument, and consideration of the motions, the trial court denied Mr. Smith's motion. R. Vol. II, p. 4047-4050. The photographs were admitted into evidence during the medical examiner's testimony. R. Vol. I, p. 2796-2848; Vol. II, p. 1268-90.

II. Underlying Facts Particularly Relevant to this Appeal Arising from the Trial

A. Juror Questionnaires and Jury Selection

Prior to jury selection, Mr. Smith's counsel filed a Motion for Meaningful Inquiry in Jury Selection and Motion for Jury Questionnaire. R. Vol. I, p. 1433-34. In this motion, Mr. Smith sought a juror questionnaire for initial review of potential jurors to identify those individuals that should clearly be stricken for cause. R. Vol. I, p. 1433-34. This motion was directly requested because of the trial court's denial of Mr. Smith's motion to change venue. R. Vol. I, p. 1433, ¶¶ 3-4. The trial court granted the motion without objection from the State. R. Vol. I, p. 1505-12.

The questionnaire included eight questions, with several sub-questions, detailing the potential jurors' knowledge of the case, of witnesses, as to whether opinions about the case had been formed, and as to what opinion, if any, the potential jurors had regarding the death penalty. R. Vol. I, p. 1505-12. Three hundred jurors completed these questionnaires. R. Vol. I, p. 1512-2709. Of these three hundred, several were outright stricken for cause. R. Vol. I, p. 1512-1553. After these jurors were stricken, the first set of jurors were questioned by the parties. R. Vol. II, p. 82.

Ultimately, twelve jurors were selected by the parties. These include the following jurors: 7, 13, 15, 17, 18, 24, 29, 33, 34, 46, 62, and 63. R. Vol. II, p.,1478-79. Each of these jurors completed a questionnaire and went through additional

questioning by the parties. R. Vol. I, p. 1875-78; 1883-90; 1896-92; 1915-18; 1927-30; 1934-41; 1966-69; 1994-2001.

Based on the questionnaires, these jurors stated that eight out of the twelve had either heard or read about the case before becoming a prospective juror. *Appendix A*. Two of the twelve had heard of Donald Smith, three had heard of Cherish Perrywinkle, two had heard of Rayne Perrywinkle, two had already formed an opinion regarding Mr. Smith's guilt or innocence, and six had heard of the case from the news. *Appendix A*.

B. Renewed Motions to Change Venue and Supplementing of the Record in Support

Mr. Smith renewed his motion to change venue prior to and after jury selection concluded. R. Vol. II, p. 4-5; 604. The trial court denied this motion. R. Vol. II, p. 4-5; 604; 607-08. In response, the defense sought to supplement the record in support of its motion with additional news articles that were published prior to trial commencing—some of which including evidence the trial court deemed inadmissible. R. Vol. II, p. 4-5. The State had no objection to this request. R. Vol. II, p. 4-5; 434. The trial court granted the request, and the defense counsel report stated that these documents were submitted into the record. R. Vol. II, p. 604. However, despite renewing this motion, and receiving permission to supplement the

record, the news articles were not included as part of the record.[10] Thereafter, the parties proceeded to trial.

C. Prosecutor's Comments During Opening Statement

During its opening statement, the State outlined its case, the actions taken by Mr. Smith, the witnesses who would testify, and the evidence to be considered. R. Vol. II, p. 1008-23. In laying out the facts, the following statement and objection occurred:

> Prosecutor: So you will see as she skips right out of Walmart after him, because McDonald's had closed. 20 minutes went by before Rayne realized that the McDonald's in that Walmart wasn't open. Where was her daughter? Cherish was not there. Intuition turned into dread and dread turned into panic as she looked all over that store for her daughter. 20 minutes later she still had not found Cherish. *Every mother's darkest nightmare became Rayne Perrywinkle's reality*.
>
> Defense Counsel: Objection, Your Honor. Argumentative.
>
> The Court: I'll overrule the objection.
>
> Prosecutor: *Every mother's darkest nightmare became Rayne Perrywinkle's reality.* She would never see her daughter Cherish alive again …

R. Vol. II, p. 1015 (emphasis added).

[10] Undersigned counsel conferred telephonically with Ms. Julie Schlax, trial counsel for Mr. Smith. She could not recall submitting these exhibits with the court and believed the defense "forgot" to include these news articles in the record.

No additional objections were made by the defense during the State's opening statement. After the opening, the State proceeded with calling several witnesses, including the medical examiner who performed the autopsy of Cherish Perrywinkle.

D. The Medical Examiner's Testimony

Dr. Valerie Rao was the long-serving Chief Medical Examiner in Duval County and was a trained forensic pathologist. R. Vol. II, p. 1257-58. For nearly forty years, she had specialized in performing autopsies, and was board certified in clinical, anatomic, and forensic pathology. R. Vol. II, p. 1258. At the time of trial, she estimated that she had performed "thousands" of autopsies. R. Vol. II, p. 1260. She had also been qualified and testified as an expert witness "hundreds of times." R. Vol. II, p. 1261. She was qualified as an expert witness by the trial court without objection by the defense. R. Vol. II, p. 1262.

Dr. Rao was the person who conducted the autopsy of Cherish Perrywinkle. R. Vol. II, p. 1262. Prior to trial, the parties stipulated that Cherish Perrywinkle was the person that Dr. Rao autopsied. R. Vol. I, p. 2781. When the body was found, Dr. Rao actually went to the scene "[b]ecause of the nature of the case. It was a child that was abducted. It was something that the entire City of Jacksonville was concerned about, being that it was a child." R. Vol. II, p. 1263.

During her testimony, Dr. Rao was shown a set of photographs from the autopsy. R. Vol. II, p. 1266. At the time of the introduction of these photographs,

the defense renewed its objection to their admission, the trial court overruled the defense objection, and the photographs were admitted into evidence. R. Vol. II, p. 1267.

The State called Dr. Rao to testify to explain the injuries sustained by Cherish Perrywinkle. R. Vol. II, p. 1267-91. In doing so, she reviewed and explained the autopsy photographs to the jurors as they were able to view them. At the point she began to review the photographs related to the dissection of Cherish Perrywinkle's throat, Dr. Rao, in front of the jury, broke down. R. Vol. II, p. 1290-91. She stammered, began to cry, and requested a five-minute recess. R. Vol. II, p. 1290-91. The trial court granted a ten-minute recess. R. Vol. II, p. 1291.

After the jury left the room, Mr. Smith's defense counsel moved for a mistrial. R. Vol. II, p. 1291. Mr. Smith's counsel argued that a mistrial should be granted because, "we have the Chief Medical Examiner on the stand crying during the testimony about her autopsy and she's previously testified that she has done thousands of autopsies. We would at this point move for a mistrial. We believe this is so prejudicial that it cannot be cured by any kind of instruction and ask for a mistrial at this time." R. Vol. II, p. 1291.

In response, the State offered to inquire about how this autopsy impacted Dr. Rao. R. Vol. II, p. 1291. Without any additional argument, the trial court denied the motion for mistrial. R. Vol. II, p. 1291. The defense then requested to add argument

to include that the parties had been present at a hearing earlier to discuss these photographs and Dr. Rao did not have an emotional response. R. Vol. II, p. 1292. Further, the need for a mistrial, and the subsequent prejudice from her crying before the jury was even greater because she was a "professional witness." R. Vol. II, p. 1292.

In response, the State argued that even doctors are human beings and may have an emotional response based on the testimony and the emotions in the courtroom. R. Vol. II, p. 1292. Following these arguments, the trial court again denied Mr. Smith's motion for mistrial. R. Vol. II, p. 1293. No curative instruction or survey of the impact of Dr. Rao's crying had on the jury was conducted by the trial court. Following the presentation of the additional evidence in the case, the State proceeded to its closing argument.

E. Prosecutor's Comments During Closing Argument

During the State's closing argument, it outlined the evidence, its theory, and the applicable law. R. Vol. II, p. 1420-38. In addition, the State argued the following:

> Even in death through the irrefutable physical evidence that was left behind, the injuries to her body, the biological evidence that he left on her and inside of her, through that evidence has a voice. And from the grave she's crying out to you, Donald Smith raped me. Donald Smith sodomized me. Donald Smith strangled me until every last breath left my body.

R. Vol. II, p. 1436.

The defense did not object to this argument. No other objections were made by the defense during the State's closing argument.

SUMMARY OF THE ARGUMENT

Mr. Smith alleges five errors that either individually, or cumulatively, afford him a new trial. First, the trial court abused its discretion in denying his motion for change of venue. Specifically, the pretrial publicity was so expansive that it saturated the community for years, provided a one-sided and continuous narrative leading to one conclusion at trial, Mr. Smith's inevitable conviction, and death sentence. This prejudice was evident years before jury selection occurred, and was clear also because of the manner the parties had to proceed to even start the process of jury selection. Due to the expansive pretrial publicity, including Mr. Smith's inculpatory statements, there was inherent prejudice in the proceedings, making it impossible for Mr. Smith to receive a fair trial in Duval County, Florida. Thus, the trial court abused its discretion in denying Mr. Smith's motion to change venue.

Second, the trial court abused its discretion in denying Mr. Smith's motion for mistrial after the Chief Medical Examiner began to cry on the stand while looking through the autopsy photographs of Cherish Perrywinkle. As an expert witness, discussing the most difficult and gruesome portion of the trial, her reaction to these photographs, as a professional witness, was significant. It vitiated the entire fairness of the proceedings. It was impossible for Mr. Smith to receive a fair trial after her

reaction, and therefore, the trial court abused its discretion in denying Mr. Smith's motion for mistrial.

Third, the trial court abused its discretion in denying Mr. Smith's motion to exclude the graphic photographs of the autopsy. As demonstrated by Dr. Rao's reaction, these photographs, while relevant, were so overwhelming and gruesome that an experienced pathologist could not maintain her composure when viewing them. The probative value of the photographs was far outweighed by the prejudicial effect on admitting them had in this case. As such, the trial court erred in denying Mr. Smith's motion.

Fourth, the trial court, and the State, each individually and reversibly erred in allowing the prosecutor to make inappropriate comments during opening and closing arguments. The trial court sanctioned the prosecutor's argumentative and emotionally charged comments by overruling the defense's objection in opening statement. Additionally, the State committed fundamental error during its closing argument by making emotionally charged pleas to the jury when it said that Cherish Perrywinkle was crying out to them from the grave for justice. Therefore, the trial court reversibly erred and abused its discretion in overruling the defense's objection during the State's opening when it stated that, "Every mother's darkest nightmare became Rayne Perrywinkle's reality."

Finally, the cumulative effects of these errors—even if each alleged error does not rise to the level of reversible error—constitute a collective a basis for reversal and a new trial. Therefore, as discussed fully below, this Court should reverse and remand Mr. Smith's conviction and death sentence and remand for a new trial.

ARGUMENT

I. The Trial Court Abused Its Discretion by Denying Mr. Smith's Motion to Change Venue

Mr. Smith moved to change venue on repeated occasions due to the intense pretrial publicity related to his case. R. Vol. II, p. 4-5; 424; 604; 607-609. The trial court was confronted by the question at the core of this issue from the beginning of this trial: "When does the publicity attending conduct charged as criminal dim prospects that the trier can judge a case, as due process requires, impartially, unswayed by outside influence?" *Skilling v. United States*, 561 U.S. 358, 378-379 (2010). Despite the clarity, and continual renewal of Mr. Smith's request, the trial court denied his motion. In doing so, the trial court abused its discretion. *See Davis v. State*, 461 So. 2d 67, 69 (Fla. 1984) ("An application for change of venue is addressed to a trial court's sound discretion, and a trial court's ruling will not be reversed absent a palpable abuse of discretion."). As such, Mr. Smith is entitled to a new trial in a different venue.

A criminal defendant has a right to a fair and impartial trial. This right is guaranteed by the United States and Florida constitutions. U.S. CONST. amends. VI,

XIV; art. I, § 16, Fla. Const. (1980). "The theory of our [trial] system is that the conclusions to be reached in a case will be induced only by evidence and argument in open court, and not by any outside influence, whether of private talk or public print." *Patterson v. Colorado ex rel. Attorney General of Colo.*, 205 U.S. 454, 462 (1907) (opinion for the Court by Holmes, J.). As such, criminal defendants especially have the right to be tried in a forum "free of prejudice, passion, excitement, and tyrannical power." *Sheppard v. Maxwell*, 384 U.S. 333 (1966).

When prejudicial publicity and an inflamed community atmosphere coalesce, a defendant is entitled to a change of venue in order to ensure his Sixth Amendment right to an impartial jury and Fourteenth Amendment due process right to a fair trial. *See Rideau v. Louisiana*, 373 U.S. 723 (1963); *Estes v. Texas*, 381 U.S. 523 (1965); *Irvin v. Dowd*, 366 U.S. 717 (1961). Admittedly, in "[o]rdinar[y]" cases, trial courts need not grant a change of venue motion "until an attempt is made to select a jury." *Serrano v. State*, 64 So.3d 93, 112 (Fla. 2011) (per curiam). However, in "extreme or unusual situation[s]," trial courts "may make that determination upon the basis of evidence presented prior to the commencement of the jury selection process...." *Id.* at 112 (quoting *Manning v. State*, 378 So.2d 274, 276 (Fla. 1979)). This was such a case.

In these rare cases, going through the process of selecting a jury to determine whether an impartial jury can be sat is unnecessary. This may be so because when

pretrial publicity approaches the saturation level, courts should disregard prospective jurors' assurances of impartiality and presume prejudice. *See Mu'Min v. Virginia*, 500 U.S. 415, 429-30 (1991) (warning that when pretrial publicity is pervasive within a community, a "juror's claims that they can be impartial should not be believed" and *voir dire* is an inadequate curative); *see also Sheppard*, 384 U.S. at 355; *Estes*, 381 U.S. at 551; *Rideau*, 373 U.S. at 727; *Irvin*, 366 U.S. at 722-723.

Therefore, while the defendant bears the burden of proof on a change of venue motion, the Court is "bound to grant" it "when the evidence presented reflects that the community is so pervasively exposed to the circumstances of the incident that prejudice, bias, and preconceived opinions are the natural result." *Manning*, 378 So.2d at 276. Moreover, any doubts about potential impact of negative pretrial publicity should be weighed "liberally" in a defendant's favor, as explained by this Court fifty years ago:

> *We take care to make clear . . . that every trial court in considering a motion for change of venue must liberally resolve in favor of the defendant any doubt as to the ability of the state to furnish a defendant a trial by a fair and impartial jury*. Every reasonable precaution should be taken to preserve to a defendant trial by such a jury and to this end *if there is a reasonable basis shown for a change of venue, a motion therefore properly made should be granted.* A change of venue may sometimes inconvenience the state, yet we can see no way in which it can cause any real damage to it. On the other hand, granting a change of venue in a questionable case is certain to eliminate a possible error and to eliminate a costly re-trial if it be determined that the venue should have been changed. More important is the fact that real

> impairment of the right of a defendant to trial by a fair and impartial jury can result from the failure to grant change of venue.

Singer v. State, 109 So.2d 7, 14 (Fla. 1959) (emphasis added).

This admonition that a defendant should receive a fair and impartial trial, where even a reasonable basis is shown, runs through the subsequent rules of procedure, cases arising from this Court, and the United States Supreme Court.

Under Florida law, a "defendant may move for a change of venue on the ground that a fair and impartial trial cannot be had in the county where the case is pending for any reason other than the interest and prejudice of the trial judge." Fla. R. Crim. P. 3.240. When seeking a new venue, the defendant has the burden to "show inherent prejudice in the trial setting *or* facts which permit an inference of actual prejudice from the jury selection process. . . ." *McCaskill v. State*, 344 So. 2d 1276, 1278 (Fla. 1977) (emphasis added).

In *McCaskill v. State*, 344 So. 2d 1276, 1278 (Fla. 1977), this Court adopted the test set forth in *Murphy v. Florida*, 421 U.S. 794 (1975), and *Kelley v. State*, 212 So. 2d 27 (Fla. 2d DCA 1968), for determining whether to grant a change of venue: "whether the general state of mind of the inhabitants of a community is so infected by knowledge of the incident and accompanying prejudice, bias, and preconceived opinions that jurors could not possibly put these matters out of their minds and try the case solely upon the evidence presented in the courtroom." *Id.* at 1278 (quoting *Kelley*, 212 So. 2d at 28).

The trial judge's decision regarding a change of venue is based on a two-pronged analysis. *Griffin v. State*, 866 So. 2d 1, 12 (Fla. 2003). Specifically, the trial court must evaluate: "(1) the extent and nature of any pretrial publicity; and (2) the difficulty encountered in actually selecting a jury." *Griffin*, 866 So. 2d at 12. Regarding the second prong of the analysis, the critical inquiry is "whether any difficulty encountered in selecting a jury . . . reflected a pervasive community bias against [the defendant] which so infected the jury selection process that it was impossible to seat an impartial jury" in the county where the trial was held. *Rolling v. State*, 695 So. 2d 278, 287 (Fla. 1997). Some of the factors to consider when evaluating pretrial publicity, include:

> (1) when the publicity occurred in relation to the time of the crime and the trial;
>
> (2) whether the publicity was made up of factual or inflammatory stories;
>
> (3) whether the publicity favored the prosecution's side of the story;
>
> (4) the size of the community exposed to the publicity; and
>
> (5) whether the defendant exhausted all of his peremptory challenges in seating the jury.

State v. Knight, 866 So. 2d 1195, 1209 (Fla. 2003)\(citing *Manning*, 378 So. 2d at 276).

If a trial court decides to wait until *voir dire* to decide the motion, the Court then must evaluate the difficulty in selecting an impartial jury. *Id.* And, even then,

the court should be wary of blindly accepting jurors' assessments of their own ability to be fair, because as this Court instructed in *Rolling*, "such assurances are not dispositive[.]" *Rolling*, 695 So. 2d at 285.

However, inherent prejudice in a proceeding can be shown by a defendant prior to even selecting a jury through evidence that "the setting of the trial is inherently prejudicial because of the general atmosphere and state of mind of the inhabitants in the community." *Manning v. State*, 378 So. 2d 274, 276 (Fla. 1980) (citation omitted). This prejudice from pretrial publicity may be presumed where the publicity was sufficiently prejudicial and inflammatory that it pervaded the community where the trial was held. *Coleman v. Kemp*, 778 F.2d 1487, 1490 (11th Cir. 1985), *cert. denied*, 476 U.S. 1164, 106 S.Ct. 2289, 90 L.Ed.2d 730 (1986) (citing *Rideau*, 373 U.S. at 723; *Murphy*, 95 S.Ct. at 2035).

In *Rideau*, a defendant robbed a bank in a small Louisiana town, kidnapped three bank employees, and killed one of them. Police interrogated the defendant in jail without counsel and obtained his confession. Without informing the defendant, the police filmed the interrogation, and on three separate occasions before the trial, a local television station broadcast the film to audiences ranging from 24,000 to 53,000 individuals. The defendant moved for a change of venue, arguing that he could not receive a fair trial in the venue where the crime occurred, which had a population of approximately 150,000 people. The trial court denied the motion, and

a jury eventually convicted him. The Supreme Court of Louisiana upheld the conviction.

The Supreme Court reversed holding that, "What the people [in the community] saw on their television sets … was [the defendant], in jail, flanked by the sheriff and two state troopers, admitting in detail the commission of the robbery, kidnapping, and murder." *Id.* at 725. "[T]o the tens of thousands of people who saw and heard it," the Supreme Court explained, the interrogation "in a very real sense *was* [the defendant's] trial--at which he pleaded guilty." *Id.* at 726. The Supreme Court, therefore, "d[id] not hesitate to hold, without pausing to examine a particularized transcript of the *voir dire*," that "[t]he kangaroo court proceedings" trailing the televised confession violated due process. *Id.* at 726-727; *see also, Estes v. Texas*, 381 U.S. 532, 536 (1965) (holding reporters and television crews overran the courtroom and "bombard[ed] . . . the community with the sights and sounds of" the pretrial hearings with overzealous reporting efforts, "led to considerable disruption"); *Sheppard* v. *Maxwell*, 384 U.S. 333, 358 (1966) (overturning conviction and sentence because pretrial reporting created a "carnival atmosphere" pervaded that pervaded the trial).

This Court, too, has overturned a conviction based on a claim of inherent prejudice. In *Manning*, this Court held "that the general atmosphere in this rural community was sufficiently inflammatory to require the trial court to grant a change

of venue, and his failure to do so constituted an abuse of discretion," when "[e]very member of this prospective jury had knowledge of ex parte statements of the evidence against the accused," and the record showed "that hostility existed in the community against the accused to the extent that it would be difficult for any individual to take an independent stand adverse to this strong community sentiment." *Manning*, 378 So. 2d at 276-77.

Mr. Smith had continually argued, from 2015 through the trial in 2018, that there would be inherent prejudice for any trial that took place in Duval County, based on the extensive pretrial publicity and public sentiment. When viewing each of the factors outlined above, his concern is clearly supported.

First, the publicity was continuous from the date of the crime through the day of jury selection, and beyond. The trial court even recognized in its order allowing the media to intervene that at almost every court appearance there was print or broadcast news present. R. Vol. I, p. 1206 ("This Court also notes it has observed the print and broadcast media in attendance at nearly every hearing conducted in Defendant's case.") Even the day of jury selection, Mr. Smith's trial counsel moved to supplement the record to support his motion to change venue to include recent news articles that were covering the trial. R. Vol. II, p. 4-5. These news reports supposedly included portions of the 911 tape the trial court had deemed to be inadmissible. R. Vol. II, p. 4-5.

Second, the publicity was made up of both factual and inflammatory stories. These included stories about the facts of the case, Mr. Smith's prior criminal history, and the progression of the various stages of the case as the parties continued to trial. However, these stories also included repeated references that Mr. Smith was a monster, pure evil, and deserving of the death penalty. These news stories about Mr. Smith contained blatantly prejudicial information of the type readers or viewers could not reasonably be expected to shut from sight. Additionally, the reported inculpatory statements by Mr. Smith were likely imprinted permanently in the mind of anyone who watched or heard them. *See Parker v. Randolph*, 442 U.S. 62, 72 (1979) (plurality opinion) ("[T]he defendant's own confession [is] probably the most probative and damaging evidence that can be admitted against him.") (internal quotation marks omitted)).

Third, the publicity clearly and consistently favored the prosecution's side of the story. At least one story referenced Mr. Smith's possible alibi defense—to make clear it would not be a viable defense. The stories reported about the case continuously favored the State in every conceivable way and were never sympathetic to Mr. Smith's possible version of events or any potential defense.

Fourth, admittedly, the size of the community exposed to the publicity was much larger than the other communities in which courts have found inherent prejudice. However, the length of time from the date of Mr. Smith's arrest, to the

date of trial, provided the media years to report on the story and to saturate the community with one-sided information about the case.

Fifth, Mr. Smith did not exhaust all of his peremptory challenges in seating the jury. However, the lengths that the parties agreed to for purposes of seating a jury, i.e., bring three hundred potential jurors in, with extensive juror questionnaires, and then questioning eighty jurors, demonstrates the real concern among all involved in the case that a fair and impartial jury could not possibly be selected.

After being appointed, the undersigned supplemented the record on appeal with the known news articles in relation to this case. The supplement consists of over six-hundred pages. The articles began immediately, and on the first day the report was "Cherish, a life cut short. A 56 year-old man out of jail just 3 weeks, a sex offender with a **history of Horrendous Crimes against Children…**" That was the tone set in the local media, picked up by national outlets, and carried throughout the case. There are too many quotes from Huffington Post, CNN, HLN, ABC, NBC, CBS, Jacksonville.com, News4Jax, First Coast News, and other media outlets to even try to enumerate. Social Media also played a factor, with the media outlets sharing the stories, and even specific groups created simply to share the latest news stories dedicated to the case. The amount of negative media already convicting the Appellant was overwhelming. While the rule is to attempt to seat a jury panel, at some point, this case rose to the level that keeping it in Jacksonville would make it

impossible to seat an impartial jury and therefore created fundamental error should a jury be seated.

The trial court should have moved the case on its own motion, let alone deny the defense request to change the venue. In the last thirty years, only one case has been moved from Jacksonville and it was on the court's own motion. Judge Charles Arnold did so in the Maddie Clifton death at the hands of Josh Phillips. Hundreds of defendants have tried, and none have been successful, out of Jacksonville when petitioning the court to change venue so they can obtain a fair trial. The sole case where the venue was changed was Sua Sponte by the trial judge. The undersigned believes it is the only case to have ever been moved from Jacksonville since the reinstatement of the death penalty. The amount of publicity generated by this case rose to the level of fundamental error when the defense motion was denied, but the defense should not have even had to make the motion. The case was so notorious that the trial court should have changed the venue on its own accord.

Based on the foregoing, the trial court erred in denying his repeated requests for a change in venue. Therefore, this Court should reverse and remand his conviction and sentence and order a new trial.

II. The Trial Court Abused Its Discretion by Denying Mr. Smith's Motion for Mistrial After the Medical Examiner Became Emotional During Her Testimony Before the Jury

During her testimony at trial, Dr. Rao was beginning to review photographs related to the dissection of Cherish Perrywinkle's throat when, in front of the jury, she broke down, stammered, and began to cry. R. Vol. II, p. 1291. She then requested a five-minute recess. R. Vol. II, p. 1291. Mr. Smith's defense counsel moved for a mistrial, R. Vol. II, p. 1291-92, that the trial court denied this motion. R. Vol. II, p. 1293. The trial court erred in denying this motion for mistrial.

A trial court's ruling on a motion for mistrial is reviewed for an abuse of discretion. *See Merck v. State*, 664 So. 2d 939, 941 (Fla. 1995). The decision to grant a mistrial is "required only when the error upon which it rests is so prejudicial as to vitiate the entire trial, making a mistrial necessary to ensure that the defendant receives a fair trial." *Dessaure v. State*, 891 So. 2d 455, 464-65 (Fla. 2004). Admittedly, there is "no bright line rule in cases involving an emotional outburst from a witness" to assist with determining whether a trial court erred in denying a motion for mistrial. *Colon v. State*, 191 So. 3d 985, 986-987 (Fla. 2d DCA 2016) (reversing denial of motion for mistrial due to mother of victim's reaction to photographs of her child-victim's vagina). Generally, when considering a motion for mistrial based on a witness's emotional outburst, "appellate courts should defer

to trial judge's judgments and rulings when they cannot glean from the record how intense a witness's outburst was." *Thomas v. State*, 748 So. 2d 970, 980 (Fla. 1999). However, in this case, the record includes a portion of the video recording of the testimony at issue. *State's DVD Exhibit #1*.[11]

Essentially, the trial court erred in denying this motion for four reasons. First, Dr. Rao, and who she was in the case, was incredibly important to the State's case. As Mr. Smith's counsel noted during his argument, Dr. Rao was a "professional" witness, R. Vol. II, p. 1292, who had just testified to performing "thousands" of autopsies, R. Vol. II, p. 1260, was qualified as an expert over "hundreds of times," R. Vol. II, p. 1261, and had nearly a forty-year career as a forensic pathologist. R. Vol. II, p. 1258. *Any* emotional reaction from Dr. Rao was bound to have a clear and immediate impact on the jury.

Second, the State intended for Dr. Rao's testimony to be impactful based on the subject matter, as well as the accompanying photographs which were to be offered during her testimony. Her opinions, and how she delivered those opinions, were of the utmost importance to the State's case—as well as the defense's case. A professional witness's reaction to these photographs, and the subject matter, would have undoubtedly had an impact on the jury, and a prejudicial impact on Mr. Smith's

[11] This recording lasts a total of 54 minutes and17 seconds. The portion of the video where Dr. Rao requested a break begins at 40 minutes 29 seconds and concludes at 41 minutes 12 seconds.

case. While the prejudicial impact was intended, it was intended to be made based on the evidence, not the witness's emotional reaction to the evidence.

Third, coupled with her reaction, is the fact that at the same time Dr. Rao is becoming emotional by observing and testifying regarding these photographs, the jurors are also looking at these same graphic photographs. R. Vol. II, p. 1290-1291. These are the same photographs Mr. Smith moved to exclude prior to trial for being too graphic.

Fourth, and finally, although the trial court could have, it failed to survey the jurors or give a curative instruction regarding Dr. Rao's emotional reaction to the photographs. *See Arbelaez v. State*, 626 So. 2d 169, 176 (Fla. 1993) (affirming denial of a motion for mistrial after the trial court surveyed the jurors to confirm they could disregard the emotional outburst of a lay witness who cried throughout her testimony). This allowed the error to sit with the jury.

Dr. Rao's emotional reaction before the jury warrant a new trial. The weight of her identity as an expert witness, her years of experience, and the importance of her testimony for the State's case were intended by the State to have an impact on the jury. That is why the State called her. However, her emotional reaction, coupled with the graphic photos displayed, would have undoubtedly had a profoundly prejudicial impact on the jurors. This impact was not based on the evidence she was explaining, but rather based on the emotions the evidence was clearly evoking in

someone as experienced as she was around such graphic images and evidence. This error is only compounded by the fact the trial court failed to offer any curative instruction, or survey the jury, after Dr. Rao's emotional reaction. Based on the foregoing, the trial court abused its discretion when denying the defense's motion for mistrial. As a result, Mr. Smith should be afforded a new guilt phase to the trial.

III. The Trial Court Abused Its Discretion by Denying Mr. Smith's Motion to Exclude Autopsy Photographs of Cherish Perrywinkle

In Mr. Smith's Eighth Motion in Limine, he moved to prevent the State from offering the autopsy photographs of Cherish Perrywinkle. R. Vol. I, p. 1449-51. Specifically, Mr. Smith argued the probative value was substantially outweighed by the prejudicial effect to show these images to the jury that would "shock" them. R. Vol. I, p. 1450. Additionally, due to the graphic nature of the photographs, as well as the fact the medical examiner would testify to the injuries at issue, the photographs were cumulative. R. Vol. I, p. 1450. In response, the State argued the probative value of the photographs outweighed any prejudice because the photographs revealed the cause of death, the location of the victim's wounds, the victim's identity, and the photographs were not cumulative. R. Vol. I, p. 1467-72. The trial court denied Mr. Smith's motion in limine and the photographs were admitted into evidence during Dr. Rao's testimony. R. Vol. I, p. 2796-2848; Vol. II, p. 1268-90.

Photographic evidence is admissible if it is relevant to a material fact in dispute. *Pope v. State*, 679 So. 2d 710, 713 (Fla. 1996) ("The test for admissibility of photographic evidence is relevancy rather than necessity."). A trial court's ruling on the admissibility of photographs is reviewed for an abuse of discretion. *Philmore v. State*, 820 So. 2d 919, 931 (Fla. 2002).

When determining whether a trial court abused its discretion in admitting photographs, the trial court must still determine whether the "gruesomeness of the portrayal is so inflammatory as to create an undue prejudice in the minds of the jury and [distract] them from a fair and unimpassioned consideration of the evidence." *Czubak v. State*, 570 So. 2d 925, 928 (Fla. 1990) (quoting *Leach v. State*, 132 So. 2d 329, 331-32 (Fla. 1961), *cert. denied*, 368 U.S. 1005 (1962)); *see also Provenzano v. Dugger*, 561 So. 2d 541, 549 (Fla. 1990) ("Photographs must only be excluded when they demonstrate something so shocking that the risk of prejudice outweighs its relevancy.").

All photographs are subject to a section 90.403, Florida Statute (2013), balancing test. *Patrick v. State*, 104 So. 3d 1046 (Fla. 2012). Under section 90.403, "Relevant evidence is inadmissible if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of issues, misleading the jury, or needless presentation of cumulative evidence." § 90.403, Fla. Stat. (2013).

Here, the trial court abused its discretion in admitting the number of graphic number of photographs of Cherish Perrywinkle's autopsy. While each photograph was relevant, the probative value of each of the photographs was outweighed by its prejudicial effect. From a cumulative perspective, the prejudice is multiplied exponentially. Each photograph was shocking, as is evidenced by Dr. Rao's crying on the stand when viewing and describing these injuries. As a result, the trial court erred in admitting these photographs to the jury.

Alternatively, if the trial court did not err in admitting these photographs outright, it erred in admitting the number of photographs that it did. Specifically, the trial court allowed several photographs, from different angles, of the same or similar injuries. As a result, the photographs offered with cumulative and should have been limited further.

Even where the admission of photographs does not rise to the level of reversible error, admission of graphic photographs may still be error. *See, e.g., Thompson v. State*, 619 So. 2d 261, 266 (Fla. 1993) (finding error in admission of irrelevant autopsy photographs error, although harmless, "given the testimony of the eyewitness, the medical examiner, and the appellant himself, and the other photographs admitted into evidence"); *Almeida v. State*, 748 So. 2d 922, 930 (Fla. 1999) (finding admission of irrelevant autopsy photo error, although harmless, "in light of the minor role the photo played in the State's case"). If this Court finds that

the admission of these photographs were not in and of themselves reversible error, at the very least, this error should be considered when evaluating the effect of a cumulative error on the proceedings.

IV. The State Violated Mr. Smith's Right to a Fair Trial by Making Improper Comments in Both the Opening and Closing Statements of the Guilt Phase of the Trial

In both the opening and closing statements, the State made comments that deprived Mr. Smith of a fair trial. Both were intended to evoke an emotional reaction rather than to explain the anticipated evidence in the case, or what evidence was offered by the State to prove its case.

A. The Trial Court Abused Its Discretion When It Overruled the Defense's Objection to the State's Comment in Opening Statement that "Every mother's darkest nightmare became Rayne Perrywinkle's reality."

During the opening statement, the State described the sequence of events leading to Cherish Perrywinkle's kidnapping, and Rayne Perrywinkle's realization that her daughter was missing. R. Vol. II, p. 1015. The prosecutor then stated: "Every mother's darkest nightmare became Rayne Perrywinkle's reality." R. Vol. II, p. 1015. Defense counsel objected, the trial court overruled the objection, and then the State repeated the same statement to the jury. R. Vol. II, p. 1015.

It is well-settled that the "purpose of an opening statement is for counsel to outline the facts expected to be proved at trial. It is not the appropriate place for

argument." *First v. State*, 696 So.2d 1357, 1358 (Fla. 2d DCA 1997). When speaking to a jury, "[i]t is the responsibility of the prosecutor to seek a verdict based on the evidence without indulging in appeals to sympathy, bias, passion or prejudice." *See Edwards v. State*, 428 So. 2d 357, 359 (Fla. 3d DCA 1983). While "the rule against inflammatory and abusive argument by a state's attorney is clear, each case must be considered upon its own merits and within the circumstances pertaining when the questionable statements were made." *Muehleman v. State*, 503 So.2d 310, 317 (Fla. 1987) (quoting *Bush v. State*, 461 So.2d 936, 941 (Fla. 1984)).

Here, the trial court abused its discretion in in overruling the defense counsel's objection to this statement. *Occhicone v. State*, 570 So. 2d 902, 904 (Fla. 1990). In an already emotionally charged description of the events that would ultimately lead to Cherish Perrywinkle's death, the State's argument in opening that losing a child was *every* mother's "darkest nightmare" and became her mother's "reality" is argument intended to indulge in an appeal to "sympathy, bias, passion" and "prejudice." *See Edwards*, 428 So. 2d at 359. Therefore, the trial court erred in denying the defense's objection to this statement. Because the trial court erred by overruling the defense's objection, the next inquiry is whether the prosecutor's comments were so prejudicial as to vitiate the entire trial. *See Woodel v. State*, 804 So.2d 316, 323 (Fla. 2001).

Here, this error, along with the other errors throughout the trial, were so prejudicial as to rise to the level of vitiating the entire trial because of the cumulative effect of the errors. *See, e.g., Crew v. State*, 146 So. 3d 101, 111 (Fla. 5th DCA 2014) (holding that "[t]he cumulative effect of the prosecutor's comments … denied Appellant a fair trial"); *Freeman v. State*, 717 So. 2d 105, 106 (Fla. 5th DCA 1998) (holding that "[t]he prosecutor's comments during closing argument collectively rise to the level of being 'so prejudicial as to vitiate the entire trial'" (quoting *State v. Murray*, 443 So. 2d 955, 956 (Fla. 1984))). Therefore, Mr. Smith is entitled to a new guilt phase of his trial.

B. The Prosecutor's Comments During Closing Argument Rise to Fundamental Error When Arguing that Cherish Perrywinkle was Crying Out from the Grave for Justice

During closing argument in the guilt phase of the trial, the State argued that through the physical evidence, Cherish Perrywinkle had a voice that "from the grave" is "crying out to you, Donald Smith raped me. Donald Smith sodomized me. Donald Smith strangled me until every last breath left my body." R. Vol. II, p. 1436. The defense did not object to this argument.

In closing argument, counsel is permitted to review the evidence and fairly discuss admitted testimony and logical inferences from that evidence. *See Mann v. State*, 603 So.2d 1141, 1143 (Fla. 1992) ("The proper exercise of closing argument is to review the evidence and to explicate those inferences which may reasonably be

drawn from the evidence."). Where a prosecutor's comments seek to inflame the passions of the jury, the prosecutor's conduct may rise to the level of reversible error. *See, e.g.*, *King v. State*, 623 So. 2d 486, 488 (Fla. 1993) (stating that closing argument "must not be used to inflame the minds and passions of the jurors so that their verdict reflects an emotional response to the crime or the defendant"); *Garron v. State*, 528 So. 2d 353, 359 (Fla. 1988) ("When comments in closing argument are intended to and do inject elements of emotion and fear into the jury's deliberations, a prosecutor has ventured far outside the scope of proper argument.").

Here, the prosecutor's comments that a child victim was calling out from the grave for justice was intended to "inflame the minds and passions of the jurors so that their verdict reflects an emotional response to the crime," and, is therefore, error. *King*, 623 So. 2d at 488. However, because this comment was not objected to by defense counsel, it is not properly preserved for appellate review. *See Chandler v. State*, 702 So.2d 186, 191 (Fla. 1997) The only exception to this procedural bar "is where the unobjected-to comments rise to the level of fundamental error, which has been 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.'" *Brooks v. State*, 762 So.2d 879, 899 (Fla. 2000) (quoting *McDonald v. State*, 743 So.2d 501, 505 (Fla. 1999)). This error, error, along with the other comment in opening, and other errors, require reversal because of the

cumulative effect of these errors on the trial proceeding. *See, e.g., State v. Murray*, 443 So. 2d 955, 956 (Fla. 1984). Therefore, Mr. Smith is entitled to a new guilt phase of his trial.

V. The Cumulative Effect of the Errors in this Case Deprived Mr. Smith of a Fair Trial and Require Reversal of his Convictions and Death Sentence

Even if this Court concludes that none of the aforementioned errors support reversal on their own, the cumulative effect of the errors undermined confidence in the outcome of Mr. Smith's trial. Reversal is warranted if, as a result of the cumulative effect of the errors, "the integrity of the judicial process [was] compromised and the resulting convictions. . . irreparably tainted" *Ruiz v. State*, 743 So. 2d 1, 8 (Fla. 1999), or "[the defendant] was denied the fundamental right to due process and the right to a fair trial." *State v. Townsend*, 635 So. 2d 949, 959–60 (Fla. 1994). Reversal should be granted where the trial was fundamentally unfair. *Id.* As such, this Court should reverse Mr. Smith's convictions and death sentence and remand the case for a new trial.

CONCLUSION

Appellant, DONALD JAMES SMITH, requests this Court reverse and remand his conviction and sentence of death, with directions for a new trial and penalty phase.

Respectfully submitted,

/s/ H. Kate Bedell, Esq.
H. KATE BEDELL, ESQ.
By: H. KATE BEDELL
LAW OFFICES OF BEDELL & KURITZ
200 E Forsyth Street
Jacksonville, Florida 32202
Telephone: (904) 355-1999
E-Mail: kate@kuritzlaw.com
Secondary E-Mail: contact@kuritzlaw.com
Florida Bar No.: 0632457

Counsel for Appellant

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished, via electronic mail on this 26th day of February, 2020 to Assistant Attorney General, Charmaine Millsaps at Charmaine.millsaps@myfloridalegal.com.

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this brief has been prepared with Times New Roman, 14-point type and complies with the font requirements of Rule 9.210.

Respectfully submitted,

/s/ H. Kate Bedell, Esq.
H. Kate Bedell, Esq.