IN THE DISTRICT COURT OF APPEAL
FIRST DISTRICT OF FLORIDA

WILLIE ALLEN LYNCH,

Appellant,

v. CASE NO. 1D16-3290

STATE OF FLORIDA,

Appellee.

_____ /

ON APPEAL FROM THE CIRCUIT COURT
OF THE FOURTH JUDICIAL CIRCUIT,
IN AND FOR DUVAL COUNTY, FLORIDA

# INITIAL BRIEF OF APPELLANT

ANDY THOMAS
PUBLIC DEFENDER
SECOND JUDICIAL CIRCUIT

**VICTOR HOLDER**
ASSISTANT PUBLIC DEFENDER
FLORIDA BAR NO. 71985
LEON COUNTY COURTHOUSE
301 S. MONROE ST., SUITE 401
TALLAHASSEE, FLORIDA 32301
(850) 606-8500
Victor.Holder@flpd2.com

COUNSEL FOR APPELLANT

TABLE OF CONTENTS

TABLE OF AUTHORITIES

RULES

CONSTITUTIONS



OTHER

IN THE DISTRICT COURT OF APPEAL
FIRST DISTRICT OF FLORIDA

WILLIE ALLEN LYNCH,

Appellant,

v. CASE NO. 1D16-3290

STATE OF FLORIDA,

Appellee.

_____ /

INITIAL BRIEF OF APPELLANT

## I. PRELIMINARY STATEMENT

Appellant, WILLIE LYNCH, will be referred to in this brief as "Appellant," "Defendant," or by his proper name. The record will be referred to as "R" followed by the volume number in Roman numerals followed by the appropriate page number, all in parentheses. The secured supplemental record filed with this Court on May 24, 2017, will be referred to as "Sec Supp R" followed by the volume number in Roman numerals, followed by the appropriate page number, all in parentheses. The trial court judge was the Honorable Mark Borello.

## II. STATEMENT OF CASE AND FACTS

Appellant was charged via information with sale of cocaine which had occurred on September 12, 2015 (R I 19). On December 31, 2015, Appellant received an add-on charge of sale of cocaine from this case while he was incarcerated in the Duval County Jail on another case (R I 2, 389-90). Appellant was found to be indigent and was appointed counsel (R I 10). On February 11, 2016, the State filed a notice of its intent to classify Appellant as a habitual felony offender (HFO) (R I 22). On February 22, 2016, Appellant filed a motion seeking to discharge his court-appointed counsel and appoint another attorney (R I 27). After a Nelson[1] hearing on February 16, 2016, his request was denied (R I 10-11). On March 27, 2016, Appellant filed another motion seeking to discharge his court-appointed counsel (R I 58). The court denied that motion after a Nelson hearing on March 31, 2016 (R I 358). On April 18, 2016, Appellant filed a motion in which he requested that he be allowed to represent himself (R I 85). After a Faretta[2] inquiry, his request was granted on April 22, 2016 (R I 383-84). Assistant Public Defender Tricia Rado remained as stand-by counsel (R I 384). On May 5, 2016, at the pretrial hearing Appellant was offered counsel and again requested to

[1] Nelson v. State, 274 So. 2d 256 (Fla. 4th DCA 1973).

[2] Faretta v. California, 422 U.S. 806 (1975).

represent himself, but this time he requested that Ms. Rado be removed as stand-by counsel (R I 437-49). After a Faretta inquiry he was allowed to represent himself without stand-by counsel (R I 449). Appellant filed a motion to disqualify the trial judge (R I 96). The court denied that motion (R I 101). Jury selection was scheduled for May 9, 2016.

On May 9, 2016, Appellant filed a motion to suppress the pretrial identification made through the facial recognition program used by the Jacksonville Sheriff's Office (JSO) (R I 133-37). The trial court agreed to hear the motion during the jury trial (R II 14-15). Also on May 9, Appellant filed a motion to incur costs for a private investigator, which the court granted (R II 12). Appellant was still incarcerated. He expressed a concern to the trial court that he did not have enough time to prepare for trial (R II 6), that the court was rushing him (R II 6), and that the court was not giving him a chance to get his witnesses (R II 9). In court, prior to jury selection starting, Appellant requested a two-week continuance so that he could have time to work with the private investigator the court had just authorized for him and to bring his witnesses to trial (R II 9, 14). The court denied his request for a continuance and told him that his trial was scheduled for the next day and whatever he could get done before then he was welcome to do (R II 14). Appellant informed the court that he wanted to call

Cebrica Tenah to testify at trial and that he had not had a chance to subpoena her (R II 17-18). The trial court informed him that he could try to get her to trial by "tomorrow" (R II 19). Tenah was an analyst of the Jacksonville Sheriff's Office who used a facial recognition computer program to develop Appellant as a suspect in the cocaine sale and who communicated her findings to the lead detectives in the case (Sec Supp R I 5-12). Appellant insisted that he needed Tenah for his defense (R II 17). The trial court denied his request for a continuance and told Appellant that Appellant could try to get the witness to trial within twenty-four hours, which is when the trial was scheduled for (R II 10-11, 19). The court then called in the potential jurors for jury selection (R II 25).

During jury selection, Appellant appeared, pro se, in front of the jury in his jail uniform and shackles (R II 25-66). During a recess Appellant asked the trial court if the shackles could be removed and whether he had to wear the jail uniform during the whole trial (R II 66). The trial court allowed him to change into other clothes for the duration of the trial (R II 67-68). The court refused to address the shackles.

After jury selection, Appellant requested photographs of "Midnight" from the State (R II 240). They were photos included in JSO analyst Cebrica Tenah's results from the facial recognition computer search (R II 240-45). Appellant cited

her testimony from her deposition indicating that there were photographs of other subjects returned in the search (R II 241-44). The prosecutor asserted that he did not know what Appellant was referring to and that he did not recall the testimony that Appellant was referring to (R II 241-44). Defendant argued that there were photographs of other individuals in the Jacksonville database who go by the name "Midnight" and that he had a right to use them in his defense to show that another person could have been the person who sold the cocaine to the undercover officer on the video (R II 245). The trial court ruled that the pictures were not relevant because they were never shown to the officer to make an identification (R II 246-50).

Appellant wrote a Motion to Call Witness to Bring Forth Exculpatory Evidence on May 10, 2016 (R I 167-69). The motion sought to call Cebrica Tenah as a defense witness at trial. It was mailed to the Clerk from the jail, and the postmark of the envelope was dated May 11, 2016 (R I 170). The Clerk filed it on May 14, 2016 (R I 170), after the trial had already concluded on May 10, 2016.

Prior to the opening statements on May 10, 2016, the trial court terminated Appellant's self-representation and appointed Assistant Public Defender Tricia Rado to represent him (R II 272). The trial court did so because it believed

Appellant was being disruptive by interrupting the court while attempting to make objections and legal arguments (R II 272).

The State called four witnesses at trial. Their relevant testimony is summarized below. The State also introduced three photographs of the person who sold the cocaine to the undercover officers (R II 306).

Detective N.D. Prescott:

Detective Prescott works in the narcotics unit of the Jacksonville Sheriff's Office (R II 295). He testified that it is his job to go into high crime and violent areas in an undercover capacity and to attempt to buy drugs from people he does not know (R II 295). On September 12, 2015, he and his partner, Detective Canaday, were conducting an undercover narcotics investigation between M.L.K. Street and Pearl Street in Jacksonville (R II 298-99). He testified that the area he was in was a high crime area (R II 299). He testified that Canaday made contact with an individual in an apartment on Laura Street and purchased narcotics from him (R II 300). As Canaday and Prescott were driving away from the apartment, they were flagged down by another individual who asked them if they were good (R II 300). Prescott testified that he told the man he needed "$50 hard," which meant crack cocaine (R II 300). The man told Prescott to hold on and he would be right back (R II 300). He testified that he was not able to turn on his recording

equipment because this was a spontaneous event (R II 301). Prescott traded the money for crack cocaine, and the suspect identified himself as "Midnight" (R II 301). Prescott testified that he was able to pretend to be on the phone while the man retrieved the cocaine and that he took photos of the suspect with the phone (R II 302). The man retrieved the cocaine from inside of a building (R II 311). Prescott had not met the man before that day (R II 301). Prescott identified State's Exhibit 1, 2, and 3 as the photographs he took of the suspect who sold them cocaine (R II 303-06). After the transaction, they did not arrest the suspect (R II 306). He testified that a few weeks after the transaction he obtained Appellant's name as a potential suspect through investigation (R II 308). He testified that he then looked at pictures of Appellant in a "known database" and concluded that it was Appellant who sold him the cocaine (R II 308-09). Prescott then identified Appellant in court as the man who sold him the crack (R II 309).

During cross examination, Prescott was asked if during the time between the transaction and the time when he learned Appellant's name as a potential suspect if he did any investigation to find out who the drug seller was (R II 316). Prescott responded that he was planning to set up another deal with the same seller and audio and video recording but he learned that Appellant was in jail on other charges (R II 316). The defense objected and moved for mistrial (R II 316, 322-

26). The court took the motion under advisement (R II 326). Prescott testified that Canaday sent the photo of the seller to the Crime Analysis Unit and that neither he nor Canaday did any other investigation of the suspect's identity (R II 317).

Detective Frank Canaday:

Detective Canaday is part of the narcotics unit of the Jacksonville Sheriff's Office (R II 325). On September 12, 2015, he and his partner, Detective Prescott, were conducting an undercover drug buy in an area north of downtown Jacksonville (R II 325-32). He testified that his job is to work in areas with an ongoing drug problem (R II 330). He made contact with an individual who he had previously arranged to buy drugs from and purchased them at a specific apartment (R II 332-33). After purchasing the drugs, he and Prescott were leaving in their unmarked vehicle when they were stopped further down the street by another individual who asked them if they needed anything (R II 333-34). He testified that Prescott asked the man for "hard" meaning crack cocaine (R II 334). He testified that he did not have a chance to activate any audio or video recording equipment because the encounter was sudden and unexpected and he was concerned there were other people watching them (R II 334-35). The individual went inside of a residence, was gone for no more than a minute, and returned with crack cocaine,

which was exchanged for money (R II 335-36). The suspect was not arrested that day (R II 340).

After they left, Prescott made him aware that he had taken photos of the individual (R II 336). The photos of the suspect do not show any drugs in his hands (R II 355-56). Canaday testified that the photos entered into evidence as State's 1, 2, and 3 were of the individual who sold them the crack cocaine (R II 337). Canaday then identified Appellant in court as the man who sold them the cocaine (R II 337). Canaday identified State's Exhibit 4 as the crack cocaine that was purchased (R II 339). Canaday testified that he did not know Appellant and had never seen him before that day (R II 341). He testified that a few weeks after the transaction he obtained Appellant's name through investigation (R II 341). He testified that he compared the photos of the suspect to photos of Appellant from "databases" and concluded that the Appellant was the man who sold the cocaine to them (R II 341).

Officer D.T. Flores:

Officer Flores was shown a booking photo of Appellant from December of 2016 and was asked if it was a fair and accurate depiction of Appellant at that time (R II 359). Flores testified that it was (R II 359). The photo of Appellant was introduced into evidence as State's Exhibit 5 (R II 359-60).

Kayla Kahre:

Kahre is an crime laboratory analyst in the chemistry section of the Florida Department of Law Enforcement (FDLE) (R II 362). Kahre testified that she tested State's Exhibit 4 and that it contained cocaine (R II 366-68).

The State then rested (R II 370). The defense moved for a judgment of acquittal (R II 370). The trial court denied the motion (R II 371). Appellant chose not to testify (R II 379). Appellant again requested that he be allowed to represent himself, and the court denied the request (R II 389-90). Appellant requested that he be allowed to call Cebrica Tenah to testify (R II 379-85). He also requested that he be given photographs of the five other individuals nicknamed "Midnight" in the Jacksonville area who came up in Tenah's search results because he wanted to use the photos in support of his defense theory, which was that this was a case of mistaken identity (R II 379-85). The trial court denied both requests finding that the evidence was not exculpatory (R II 385).

The defense rested and renewed its motion for judgment of acquittal (R II 399). The trial court denied it (R II 399). Appellant was found guilty as charged by the jury (R II 444). Appellant was sentenced to eight years in prison followed by five years of probation as a habitual felony offender (R I 538).

## III. SUMMARY OF ARGUMENT

As to Issue I, the trial court erred by failing to grant Appellant's request for the photographs and biographical information of the other potential matches to the suspect returned by the facial recognition software. The photos were relevant to Appellant's theory of defense and were exculpatory. The failure to provide those items violated the Florida rules regarding the discovery procedure and Appellant's Constitutional due process rights.

As to Issue II, the trial court erred by denying Appellant's request for a continuance. Appellant's request was reasonable and not made for purposes of bad faith or delay. Appellant requested a continuance in order to have a vital defense witness appear at trial in support of his theory of defense. The trial court violated Appellant's due process rights when it denied the request for a continuance.

As to Issue III, the trial court erred in denying Appellant's motion to suppress both the in-court and out-of-court identifications made by detectives in this case because the process used in identifying Appellant was impermissibly suggestive. The procedure used tainted the officers' identification of Appellant.

As to Issue IV, the trial court erred by terminating Appellant's Sixth Amendment right to represent himself at trial. Appellant did not abuse or disrespect the trial court and did not engage in seriously obstructive behavior.

As to Issue V, the cumulative effect of several errors deprived Appellant of a fair trial. The errors included allowing the admission of evidence and argument that the area of the drug transaction was a high crime area, allowing Appellant to appear in front of the jury in a jail uniform and shackles, and allowing the admission of evidence that Appellant was in a law enforcement database.

As to Issue VI, the trial court erred by denying Appellant's motion for mistrial where the detective testified that Appellant was in jail on other criminal charges when the detective attempted to find him. This testimony damaged Appellant's presumption of innocence.

As to Issue VII, the trial court erred by denying Appellant's motion for a new trial based on the trial court's errors in allowing Appellant to appear in front of the jury in shackles and a jail uniform, in terminating Appellant's right to self-representation, in denying Appellant's motion to continue the case in order to prepare for trial, and in denying Appellant's motion for mistrial.

## IV. ARGUMENT

**ISSUE I: The trial court erred by denying Appellant's request for the photographs of the other potential suspects that were returned by law enforcement's use of facial recognition computer software to search various Duval County databases**.

On April 27, 2016, Appellant's trial counsel deposed Jacksonville Sheriff's Office analyst Cebrica Tenah. During that deposition, Tenah testified that the detectives in this case emailed her a photo of the man who sold the drugs, an address where it occurred, and the nickname "Midnight" (Sec Supp R I 7). She testified that the first thing she did was check to see who had previously been arrested at that address (Sec Supp R I 7-8). Once that did not turn up any results, she searched various databases for black males with the nickname "Midnight" (Sec Supp R I 8). She then compared the photo of the drug seller to the photos of the men who were nicknamed "Midnight" (Sec Supp R I 8). She testified that this did not provide a definitive match, so she moved to the next step, which was uploading the photo of the drug seller into a facial recognition computer program[3] (Sec Supp R I 8-9). The

[3] The detective in this case wrote in his police report that Appellant was identified "using JSO equipment 'JPICS'" (R I 3). The State did not disclose the use of a facial recognition program until the April 27, 2016, deposition of JSO analyst Cebrica Tenah. The software is apparently used by multiple agencies in Florida: http://digitaledition.orlandosentinel.com/tribune/article_popover.aspx?guid=47dd5b4b-b3eb-4066-8434-76d76d25da6f

facial recognition program scans various law enforcement databases searching for matches (Sec Supp R I 8-9). She input the search parameters: black males in Duval County booking photos (Sec Supp R I 9). She ran the search, and it generated multiple potential matches (Sec Supp R I 9-10). The computer program puts some amount of stars underneath the photo it believes is more likely than the other photos to be a match and arranges the photos based on likeliness of a match (Sec Supp R I 10-11). She did not know the maximum number of stars a particular photo could have (Sec Supp R I 11). She testified, "I can't speak to the algorithms about how it puts one, two, three, four, five but it does from my understanding arrange the photos based on what's most likely to the photo that you uploaded" (Sec Supp R I 11). She testified that the program does not give percentages for its match determination (Sec Supp R I 10-11). She testified that she did not know how the computer program's algorithms worked (Sec Supp R I 11). At that point, she visually compared the photo of the drug seller to the photos generated by the computer program in the Duval County database as potential matches (Sec Supp R I 10). She determined that a photo of Appellant, which was the first photo in the list of potential matches, looked most like the drug seller (Sec Supp R I 10). Appellant's photo had a star underneath it (Sec Supp R I 11-12). She forwarded only Appellant's photo to the detective and told him that she thought Appellant was the drug seller (Sec Supp R I 10).

Detective Canaday testified at a deposition that he emailed photos of the drug seller to the JSO analyst Tenah (Sec Supp R I 21-22). He then received back from Tenah a photo of Appellant along with Appellant's criminal history (Sec Supp R I 21). He testified that Tenah's email said that Appellant was a possible match (Sec Supp R I 21).

On May 9, 2016, Appellant, who was pro se, asked the court to subpoena JSO analyst Tenah to testify or to allow him a continuance so that he could have her subpoenaed for trial (R II 9-18). The State indicated that it was not planning to call Tenah or introduce evidence of "the biometric software that was used to identify the defendant" (R II 15-18). The State was concerned that the software program would not pass Daubert's[4] admissibility requirements (R II 380). Appellant also asked the court to compel the State to turn over the photos of the other potential matches that were returned in Tenah's facial recognition computer program search (R II 240-50). Appellant referred the trial court to Tenah's deposition testimony indicating that there were photos of other potential matches along with his own photo. The prosecutor read a portion of the deposition transcript to the court, but not the part of the transcript that explained that the computer program returned multiple possible matches (R II 243-44). The trial court stated that because none of the photos from the

[4] Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579 (1993).

database were shown to the detectives, they were not relevant (R II 246). The trial court characterized the situation as "just a computer spitting out the names" (R II 246-47). The trial court ruled that the State did not have to turn over the photographs (R II 247). The trial court told Appellant he was entitled to ask about the identification procedure that was utilized in this case (R II 247).

The trial court erred by not ordering the State to turn over to the defense the photographs of the other potential matches returned by the facial recognition computer program as well as the biographical information for those individuals and by not holding an adequate Richardson[5] hearing. The State was obligated to turn over the photographs and biographical information of these potential matches under Rule 3.220 of the Florida Rules of Criminal Procedure and under the mandate of Brady v. Maryland, 373 U.S. 83 (1963), which requires that exculpatory material be turned over to the defense.

**Brady**:

The Due Process clause of the Constitution requires the prosecution to disclose to the defense any evidence in its possession or control that is material either to guilt or punishment. Brady at 87-88. The prosecutor must disclose evidence that could, in the eyes of a neutral observer, alter the outcome of the proceeding. U.S. v. Jordan,

[5] Richardson v. State, 246 So. 2d 771 (Fla. 1971).

316 F. 3d 1215, 1252 (11th Cir. 2003). Failure to do so is a due process violation. Brady at 87-88. To establish a Brady violation, the defendant must show the following: (1) that the evidence at issue is favorable to him, either because it is exculpatory or because it is impeaching; (2) that the evidence was suppressed by the State, either willfully or inadvertently; and (3) that the suppression resulted in prejudice. Johnson v. State, 921 So. 2d 490, 507 (Fla. 2005).

Here, the entire case turned on the identification of Appellant as the man who sold crack cocaine to the undercover officers. There was no physical evidence, fingerprints, or DNA linking Appellant to the cocaine transaction. The detectives sent the photo of the unknown drug seller to a JSO computer analyst who ran the photograph through a facial recognition computer program. The computer program scanned Duval County arrest databases and returned photos and biographical information for several potential matches to the unknown drug seller. The analyst visually compared the photos to the drug seller and determined that Appellant looked the most like the seller. Appellant's photo and criminal history were sent to the detectives who concluded that Appellant was the drug seller. The photos of the other potential matches were exculpatory in that they were other potential suspects who could have been the drug seller. These photos of the other potential matches were not shown to the detectives or the jury. Obviously, if there were photographs of other

suspects who were possible matches for the drug seller, these photos would have cast doubt upon the identification of Appellant as the drug seller. The photos were exculpatory, and Appellant should have been able to present those in his defense at trial.

The JSO analyst had possession of the photographs of the potential matches. Information within the possession of the police is considered to be in the possession of the prosecution. State v. Alfonso, 478 So. 2d 1119, 1121 (Fla. 4th DCA 1985). The photos therefore were in the constructive possession of the prosecutor, who failed to turn them over. It does not matter whether the failure was wilful or inadvertent. Johnson at 507.

Failure to turn over the photos to Appellant resulted in prejudice to him because it weakened his defense at trial. His defense at trial was misidentification. He was prevented from submitting evidence to the jury of the other potential matches and arguing that it was one of those individuals who was the actual drug seller. All of the individuals returned in the facial recognition search results were from the Duval County arrest database. A neutral observer would determine that the photos of the other matching suspects could have altered the outcome of the trial.

**Rule 3.220**:

A trial court's determination with regard to a discovery request is reviewed under an abuse of discretion standard. Overton v. State, 976 So. 2d 536, 548 (Fla. 2007).

On February 17, 2016, Appellant filed notice of his intent to participate in pretrial discovery (R I 25). The State has a continuing obligation to disclose to the defense any material information within the State's possession or control that tends to negate the guilt of the defendant as to any offense charged. Rule 3.220(4), Fla. R. Crim. P. The State did not originally provide the name of the JSO analyst (Cebrica Tenah) as part of its discovery exhibit, even though it was required to under subsections (4), (5), and (7) of Rule 3.220(1)(A)(I). Tenah was deposed on April 27, 2016. The prosecutor was present at the deposition. During the deposition, Tenah testified that a facial recognition computer program listed Appellant and several other individuals as possible matches to the individual photographed selling crack cocaine to the undercover officers. Appellant's photo was the only photo forwarded to detectives Prescott and Canaday. The State did not turn over the other photos, even though they were in the State's constructive possession. The prosecutor was actually aware of them at least as early as April 27, 2016, and constructively aware of them from the beginning of the case through the knowledge of the detectives and Tenah.

See, Tarrant v. State, 668 So.2d 223, 225 (Fla. 4th DCA 1996) ("It is well-settled that the state is charged with constructive knowledge and possession of evidence withheld by state agents, including law enforcement officers.") Clearly, if there were other people who were potential matches to the drug seller, Appellant should have been furnished with their photos and information so he could present it to the jury as part of his defense. Appellant's theory of defense was misidentification. The other photos were relevant, material, and would have negated his guilt by providing evidence that he was not the man in the photo selling drugs. The existence of other matches would have cast doubt on his identification as the drug seller.

Appellant requested that he be allowed to represent himself on May 5, 2016, believing that his appointed attorney was ineffective. On May 9, 2016, Appellant requested that the trial court order the State to turn over the photos of the other potential matches for the drug seller. The trial court denied his request and stated that the photos were not relevant because they had not been shown to the detectives (R II 246). This determination was error by the trial court. Whether or not the photos of the other potential matches were shown to the detectives is not the litmus test for determining whether the photos were material. The photos were of other potential suspects who the facial recognition software returned as possible matches to the drug

seller and who Appellant could have presented to the jury as part of his misidentification defense.

The trial court should have conducted an appropriate Richardson hearing once it became apparent that there was material evidence and information in the State's possession that had not been furnished to Appellant. A trial court has an affirmative obligation to conduct a Richardson hearing once it is put on notice of a discovery violation by the State, even without the defendant specifically requesting a hearing. Brown v. State, 640 So. 2d 106 (Fla. 4th DCA 1994). When a trial court is made aware of a possible discovery violation by the State within the course of the proceedings, the court has discretion to determine if such violation will prejudice the defendant at trial. State v. Cruz, 851 So. 2d 249, 251 (Fla. 3d DCA 2003) (reversing where the trial court failed to hold an adequate Richardson hearing after the defense requested a pre-trial hearing on State's failure to disclose requested discovery materials). During a Richardson hearing, the trial court must first determine whether a discovery violation actually occurred. Giles v. State, 916 So. 2d 55, 57 (Fla. 2d DCA 2005). If the court determines there was a violation, then the court must assess whether the State's discovery violation was inadvertent or willful, whether the violation was trivial or substantial, and most importantly, what effect it had on the defendant's ability to prepare for trial. Id. A trial court's rulings regarding the three-

prongs of Richardson are reviewed for an abuse of discretion, but its discretion can be exercised only following a proper inquiry. Brown v. State, 165 So. 3d 726, 729 (Fla. 4th DCA 2015). Where there has been an inadequate Richardson hearing the discovery violation is reviewed for harmless error. Id. However, the discovery violation can be found harmless only if the appellate court can say beyond a reasonable doubt that the defense was not procedurally prejudiced by the discovery violation. Id. It is the State's burden to show that the error was harmless. Id. The State must show in the record that the defendant was not prejudiced by the discovery violation. Id. The State's burden to show that a discovery violation was harmless is extraordinarily high. Id.

Here, the trial court apparently concluded that the photos were not relevant and, therefore, there was no discovery violation. The trial court focused on whether or not the photos of the other potential matches had ever been shown to Detectives Canaday and Prescott in identifying the drug seller. The trial court did not consider Appellant's argument that these other possible matches were potential suspects who Appellant should have been provided with in preparation for his trial, where he was arguing misidentification as his defense. The identification of Appellant was entirely based on his picture being returned by the facial recognition program and showed to the detectives. The photos of other possible matches returned by the program should

have been turned over to Appellant for use at trial to undermine the detectives' identification of him as the seller. The photos were material information that tended to negate Appellant's guilt because they were photos of other potential suspects in the Jacksonville area who were possible matches to the seller according to the facial recognition software.

In deciding whether the discovery violation here was harmless, this Court must determine whether the photos could have benefitted Appellant in his trial preparation or strategy, and in making that determination should consider every conceivable course of action open to Appellant. Giles at 58. One course of action was that if the State had provided Appellant with the photos of the other potential matches he could have introduced them at trial and argued to the jury that one of those individuals was the actual drug seller in support of his misidentification defense. The State's discovery violation and the trial court's ruling deprived him of that course of action.

**ISSUE II: The trial court erred by denying Appellant's request for a continuance**.

This issue was preserved by Appellant's motion for continuance prior to trial (R II 9, 14). A trial court's denial of a motion to continue is reviewed for abuse of discretion. Madison v. State, 132 So. 3d 237, 240 (Fla. 1st DCA 2013). Review is contextual, very much dependent on the circumstances presented in each case. Id.

When deciding whether to grant a continuance on the eve of trial so that a defendant can hire the counsel of his choice, the trial court *must* consider the following factors: (1) time available for preparation; (2) likelihood of prejudice from the denial; (3) defendant's role in shortening preparation time; (4) complexity of the case; (5) availability of discovery; (6) adequacy of counsel actually provided; and (7) skill and experience of chosen counsel and his pre-retention experience with either the defendant or the alleged crime. Madison at 241-42, citing McKay v. State, 504 So. 2d 1280, 1282 (Fla. 1st DCA 1986). Other factors to be considered are (1) whether the defendant's request was made in bad faith or for the purpose of delay, (2) whether the State's case would be prejudiced by a continuance, or (3) whether the trial court's schedule would not permit a continuance. Id. The same list of McKay factors is to be applied when a defendant requests to represent himself and asks for a continuance. Sessions v. State, 965 So. 2d 194 (Fla. 4th DCA 2007).

Appellant received an add-on charge of sale of cocaine in this case while in jail on other charges on December 31, 2015 (R I 3, 389-90). Appellant alleged ineffective assistance of counsel against his appointed lawyer and requested a Nelson hearing on three separate occasions between February 16, 2016, and March 31, 2016 (R I 298, 320, 344). At each of these Nelson hearings the trial court found that Appellant's appointed counsel was not ineffective. On March 31, 2016, Appellant requested to represent himself (R I 344). The trial court found that this request was equivocal and denied it (R I 358). On April 22, 2016, the trial court granted Appellant's request to represent himself with appointed counsel as standby counsel (R I 383). On April 27, 2016, Appellant's appointed attorney deposed witness Cebrica Tenah, whose name was not originally disclosed in the State's discovery exhibit (R I 23). Tenah testified that she had used facial recognition computer software to search through a Duval County arrest database of photos for potential matches to the photo of the drug seller in this case. On May 5, 2016, at a pretrial hearing Appellant requested to represent himself without any standby counsel and indicated that he had filed a bar complaint against his appointed attorney (R I 437, 446). The trial court granted his request (R I 449). On May 9, 2016, Appellant then moved for a two-week continuance, so that he could subpoena his witnesses, including Tenah, to trial (R II 9, 14, 17-18). His appointed counsel had not

subpoenaed Tenah for trial while she was acting as his attorney or as his standby counsel (R II 18-19). Appellant stated to the trial court that he needed "a chance to get [his] witnesses" (R II 9), that he had not had an opportunity to subpoena his witnesses, including Tenah (R II 17-18), and that it was vital to his defense (R II 12). Appellant moved the court to incur the cost of a private investigator, so that he could get his witnesses (R II 12). The trial court granted his motion for the private investigator, but denied his motion for a continuance (R II 12). The court told him that the trial would be the next day and that whatever he could get done before then he was welcome to do (R II 14).

Appellant's requests for the continuance, his reasoning, and the trial court's responses were as follows:

> DEFENDANT: Yes, sir. And a motion to incur costs for my investigator to get me my witnesses that I need. You're not going to give me a chance to get my witnesses at all, I need my witnesses.
> COURT: Mr. Lynch, you need to understand a couple of things. Your case was set for trial on today's date, back on February 16th of this year, which was – let me finish – which was almost three months ago. Now, during most of that period of time you were represented by an attorney, who was preparing your case. I believe depositions were taken, investigation was undertaken, all kinds of things were done. Your attorney who represented you at the time was with the Public Defender's Officer, it was Tricia Rado, I believe, now Ms. Rover[6]. But she was your attorney through much, if not all of that time. I have

[6]Ms. Rado changed her name to "Ms. Rover". Ms. Rado and Ms. Rover are the same person.

requested, and she agreed to be present in the courtroom. She is still present in the courtroom at this time. I believe the defense has indicated through Ms. Rado at that time, the last time I checked, that they were ready to go to trial today. The fact that you may not be prepared to go to trial, Mr. Lynch, does not mean your case is not ready, it certainly doesn't mean that you're being rushed into trial improperly. When you made the decision to represent yourself, you and I talked about this and it's no different than if a new attorney were to come into a case. When a new attorney makes a decision to undertake representation of a defendant, they have to take the case as they find it. In other words, if the case is set for trial and is otherwise ready to go to trial, judges are not generally going to grant a continuance just because a new attorney is coming into the case. Otherwise cases would never go to trial, because people would be able to delay them just by switching attorneys or deciding to represent themselves or all kinds of things. So, the bottom line is your going to trial today. If you feel you're not ready for trial, I'm sorry about that, but that's the situation that you find yourself in. If you would be more comfortable getting your attorney back on your case, I'm sure she'd certainly be willing to step in and be prepared to try your case this week. But again, that's your choice, I have found you competent to represent yourself, and that you have freely, willingly, and voluntarily waived your right to counsel. If you have any more questions about that waiver, I'd be happy to go over them with you again right now. But other that, as I said, I have your panel outside and we are going to start selecting your jury this morning.

(R II 9-11).

The interaction continued:

DEFENDANT: And motion to incur costs for a private investigator. I just went pro se and I need at least a couple of weeks, Your Honor, at least, to get my –

COURT: Mr. Lynch, you're not getting a couple of weeks. Your trial is this week, we're starting your trial –

DEFENDANT: That is vital to my defense, Your Honor.

COURT: Madam Clerk, will you hand me the motions, please. Okay. I'm in possession of a motion to incur costs for a private investigator, I

> am happy to grant that motion and allow you to incur costs up to $500 for purposes of a private investigator. So, show that motion is granted. Anything you can get done between now and tomorrow when we are having the trial, we'll select the jury today... And the trial will be tomorrow, so anything you can get done in the meantime, I'm happy to accommodate you as best I can. Show the motion is granted.

(R II 12-13).

Appellant explained to the trial court which witness he needed and why, but the trial court refused to grant him a continuance (R II 17-18). During the trial, Appellant again requested that Tenah be called to testify (R II 379). Tenah did not testify at trial.

In denying Appellant's motion for the two-week continuance, the trial court failed to consider most, if not all of the McKay factors. Even when pressed for time, or frustrated with the defendant's last minute request, the trial court must review the McKay criteria before denying the motion to continue and moving the case to trial. Madison at 242, citing Brown v. State, 66 So. 3d 1046, 1048-49 (Fla. 4th DCA 2011). Absent application of or findings related to the McKay factors, a trial court's order is more likely to be subject to reversal. Madison at 242, citing Jackson v. State, 979 So. 2d 442, 445 (Fla. 4th DCA 2008).

In this case, Appellant received an add-on sale of cocaine charge in this case while incarcerated in another case on December 31, 2015 (R I 3, 389-90). An information was filed on February 3, 2016 (R I 19). He was arraigned on February

11, 2016, and Ms. Rado was appointed to represent him (R I docket lines). Five days later, his case was set for pretrial hearing on May 5, 2016, with jury selection to follow on Monday, May 9, 2016 (R I docket lines). His appointed attorney represented him until April 22, 2016. During that time he tried to have her removed from his case three times and filed a bar complaint against her. While acting as standby counsel, Ms. Rado deposed witness Tenah on Wednesday, April 27, 2016. During that deposition, it was learned that Tenah had used a facial recognition program to determine potential matches to the drug seller. The program had returned multiple potential matches, including Appellant. Appellant's photo was the only one sent to the detectives by Tenah. This information was not previously disclosed to the defense. (See Issue I above regarding the discovery violation.) Witness Tenah was not listed in the State's discovery exhibit. Six business days after the deposition, on May 5, Appellant moved to represent himself and asked that Ms. Rado be removed as standby counsel. Two business days after that, on May 9, Appellant requested the two-week continuance.

In applying the McKay factors, it is clear that Appellant did not have much time to prepare his defense once the deposition of Tenah was concluded and he had moved to represent himself. The likelihood of prejudice to Appellant from denying the continuance was great, as he was prevented from presenting witness Tenah and

the exculpatory information she possessed, including the photos of the other suspects who were possible matches to the drug seller. (See Issue I above for in-depth explanation for why Tenah and the photos were important to Appellant's misidentification defense.) Appellant should not be faulted for shortening the preparation time. He repeatedly tried to have an attorney he felt was ineffective removed from his case. He finally was allowed to represent himself with standby counsel about two weeks before trial and then without standby counsel two business days before trial. The case itself was not complex, until it was disclosed one week before pretrial that law enforcement had used a facial recognition computer program to identify Appellant as a suspect and that the analyst who ran the program did not know how the computer algorithms worked. There were clear problems with the availability of discovery for Appellant (see Issue I above). Further, Appellant was forced to depose another witness, Officer Flores, on the morning of trial because the State had failed to disclose him as a witness until May 4, 2016 (R II 139). As for the adequacy of Ms. Rado, five days after she was appointed to the case she set the case for trial with a trial date less than three months away. This was before any depositions were completed or any discovery was received. She conducted two depositions in March. She conducted the Tenah deposition in late April. She did not subpoena Tenah for trial or request the photos of the other possible matches that

Tenah's search had produced once she learned of them. Appellant chose to represent himself pro se and was not familiar with the rules of procedure or evidence. In fact, the trial court terminated Appellant's right to represent himself just before opening statements because the trial court felt that he could not follow appropriate procedure or follow the directions of the court. There was no evidence that Appellant's request for a continuance was made in bad faith or for the purposes of delay. The judge mentioned a general concern that if defendants were granted continuances every time they changed lawyers, cases would never go to trial. The trial court never made any specific reference to anything Appellant had done to cause him to believe Appellant was requesting the continuance in bad faith or for delay. (Where a court's stated concern of avoiding further delay was clearly arbitrary and unsupported as a reason to deny a defendant's request, appellate courts have reversed for a new trial. See Jackson v. State, 979 So. 2d 442 (Fla. 4th DCA 2008); Foster v. State, 704 So. 2d 169, 174 (Fla. 4th DCA 1997).) Appellant, an indigent defendant, tried multiple times for months to have a new attorney appointed and settled on representing himself once those requests were denied. Once he was representing himself, he reasonably needed time to prepare his defense and subpoena his witnesses. There was no evidence that the State's case would be prejudiced by the continuance. All of the State's witnesses were locally employed. None traveled a significant distance to

appear. Speedy trial had not run. The defense had requested no prior continuances. Finally, there was no evidence that the trial court's calendar would not permit a two-week continuance. The trial lasted one day. There were only four state witnesses. Appellant would have called at least one more witness in Tenah. It is reasonable to assume that the Duval County Circuit Court could accommodate the rescheduling of a one-day jury trial.

The circumstances in this case are similar to the circumstances found in both Madison and Sessions. In both of those cases, this Court and the Fourth District reversed the trial courts' denials of the defendants' motions for continuance, finding that the trial courts had abused their discretion and denied the defendants due process. Similarly, the trial court in the instant case abused its discretion and denied Appellant due process when it denied his request for a continuance so that he could adequately prepare his defense at trial.

**ISSUE III: The trial court erred by denying Appellant's motion to suppress the in-court and out-of-court identification**.

Appellant preserved this issue by filing, prior to trial, a motion to suppress the out-of-court identification and "any other confrontation identification processes" (R I 133). The defense also objected at trial to the in-court identification of Appellant by the detectives based on the motion to suppress (R II 305 ). The trial court denied the motion to suppress without explanation (R II 400).

Review of a motion to suppress is a mixed question of law and fact. Butler v. State, 706 So. 2d 100, 101 (Fla. 1st DCA 1998). The standard of review for the trial judge's factual findings is whether competent substantial evidence supports the judge's ruling. Id. The standard of review for the trial judge's application of the law to the factual findings is de novo. Id. The trial court's factual conclusions come clothed in a presumption of correctness. State v. Sepulvado, 362 So. 2d 324, 327 (Fla. 2d DCA 1978).

Identification procedures become impermissibly suggestive where the totality of the circumstances indicate that the identification resulting from the procedure is unreliable. M.J.S. v. State, 386 So. 2d 323, 324 (Fla. 2d DCA 1980). Once a pretrial identification is found to be impermissibly suggestive, it is presumed that any in-court identification will be tainted and the burden shifts to the State to overcome the

presumption by clear and convincing evidence. Id. Showing a witness, in this case the detectives, one photograph of a suspect is unduly suggestive. Fitzpatrick v. State, 900 So. 2d 495, 518 (Fla. 2005); Washington v. State, 653 So. 2d 362, 365 (Fla. 1995). A pretrial identification obtained from suggestive procedures is not per se inadmissible, but may be introduced into evidence if found to be reliable and based solely upon the witness's independent recollection of the offender at the time of the crime, uninfluenced by the suggestive procedures. Washington at 365.

Here, the detectives emailed a photo of the drug seller to JSO analyst Tenah. She uploaded the photo into a facial recognition computer program. The program searched photos in Duval County arrest databases and returned multiple possible matches. Tenah then visually compared Appellant's photo to the photo of the drug seller and determined that Appellant could be a match. She emailed a photo of Appellant and his criminal history to the detectives and told them that she thought Appellant was the drug seller. She did not email any of the other potential matches to the detectives. The detectives viewed only Appellant's picture and criminal history, which included drug sales, concluded he was the drug seller, found that he was in the county jail, and added the charge of sale of cocaine to his list of pending charges. Exacerbating the suggestiveness of showing a single photo to the witnesses, is the fact that it was a JSO computer analyst who returned Appellant as a potential

suspect and informed the detectives that she thought he was a match. It is her job to analyze data and use computer-based tools to solve crimes. Her disclosure to the detectives that her search yielded Appellant as a potential match would have influenced them to believe it was more likely than not Appellant in the photo selling the crack cocaine.

The procedure of the pretrial identification was impermissibly suggestive and tainted the in-court identification of Appellant as the drug seller. The pretrial and in-trial identifications should have been suppressed or excluded from evidence. The trial court erred in allowing the identifications into evidence.

**ISSUE IV: The trial court erred by terminating Appellant's right to self-representation in violation of the Sixth Amendment**.

Appellant requested to represent himself pro se at his trial and that request was granted after a Faretta hearing. Appellant represented himself during jury selection. Prior to opening statements, while the trial court was hearing motions in limine, Appellant objected to the court's ruling on a motion. The court informed Appellant that his objection was noted and preserved for the record, that the trial court had ruled, and that "when the judge rules, that's it" (R II 271-72). In response, Appellant requested that he be given an opportunity to argue the objection (R II 272). The trial court told Appellant "no" and that he was going to terminate his right to self-representation if Appellant continued (R II 272). Appellant responded: "You gave [the prosecutor] an opportunity – you giving [the prosecutor] the opportunity to observe the – I'm asking the same thing, Your Honor. Give me a chance to read the motion" (R II 272). The trial court then terminated Appellant's right to represent himself finding that he was "unwilling to abide by the rules of the court" (R II 272). Appellant then apologized and promised "not to do it again," but the trial court found that this too was a violation of the rules of the court (R II 273). Appellant requested multiple times throughout the trial to be allowed to represent himself again, but each request was denied by the trial court (R II 291, 327, 344, 389).

The Sixth and Fourteenth Amendments include a "constitutional right to proceed without counsel when" a criminal defendant "voluntarily and intelligently elects to do so." Indiana v. Edwards, 554 U.S. 164, 170-71 (2008). The right of self-representation is not absolute. Id. at 171. There is no right to abuse the dignity of the courtroom, no right to avoid compliance with relevant rules of procedural and substantive law, and no right to engage in serious and obstructionist misconduct. Id. When a pro se defendant acts out or engages in serious misconduct such that his choice to represent himself cannot be reconciled with the need to maintain the efficiency and order of the proceedings, the court enjoys ample discretion to terminate that self-representation and appoint counsel. U.S. v. Ductan, 800 F. 3d 642, 655 (4th Cir. 2015). See, also, U.S. v. Mosley, 607 F. 3d 555, 558 (8th Cir. 2010); U.S. v. Myers, 503 F. 3d 676, 681 (8th Cir. 2007); Clark v. Perez, 510 F. 3d 382, 395 (2d Cir. 2008); Faretta at 834 n. 46.

Appellant's request to be given time to read the motion and to be heard on the record is not "serious and obstructionist misconduct." Appellant has an obligation to make his specific arguments against the ruling of the trial court in order for them to be cognizable on appeal. Steinhorst v. State, 412 So. 2d 332, 338 (Fla. 1982). Dealing with pro se defendants can certainly be frustrating for all parties involved, including trial courts. However, the trial court in this instance overreacted to

Appellant's attempts to be heard on a legal matter. The termination of Appellant's Sixth Amendment right to represent himself was error where Appellant had not committed serious and obstructionist misconduct. Appellant's actions, for which his Constitutional right was terminated, fell far short of the misconduct committed by the defendants in the cases cited above in which self-representation should have been terminated.

**ISSUE V: The cumulative effect of errors deprived Appellant of a fair trial**.

Cumulative error is reviewed for whether the cumulative effect of such errors may deny the defendant the fair and impartial trial that is the inalienable right of all litigants. Lukehart v. State, 70 So.3d 503, 524 (Fla. 2011). Even if the errors are deemed harmless individually, an appellate court can still find that the cumulative error denied the defendant a fair trial. Id. Where multiple errors are discovered in a jury trial, a review of the cumulative effect of those errors is appropriate because even though there was competent substantial evidence to support a verdict and even though each of the alleged errors, standing alone, could be considered harmless, the cumulative effect of such errors may be such as to deny to the defendant the fair and impartial trial that is the inalienable right of all litigants in this state and this nation. McDuffie v. State, 970 So. 2d 312, 328 (Fla. 2007). Where a defendant did not object to or move for a mistrial based on allegedly improper comments, the standard of review is fundamental error. Thomas v. State, 748 So.2d 970, 985 n. 10 (Fla.1999). Appellant's trial counsel did not object to the comments by the prosecutor or the testimony of the two detectives regarding the area being a high crime area.

**High Crime / Drug Area**:

Referring to an area as a high crime area or a high drug area can be reversible error in some circumstances but is not always so. State v. Johnson, 575 So. 2d 1292 (Fla. 1991); Gillion v. State, 573 So. 2d 810 (Fla. 1991). Where an officer testifies to a location's reputation for crime or drug sales and he is not reporting his first hand observations the testimony is inadmissible. Dorsey v. State, 639 So. 2d 158, 159 (Fla. 1st DCA 1994).

Here, during its opening statement the State told the jury that the detectives in the narcotics unit go into areas that are known as high crime areas or high drug areas to make contact with drug sellers (R II 283). Detectives Prescott and Canaday both testified that their job is to go into high crime or high drug areas and make narcotic purchases (R II 297, 307). They both testified that the area where the incident allegedly occurred in this case was a high drug or high crime area (R II 298, 299, 307). The State then referenced that detectives' testimony regarding the nature of their work in "high crime high drug" areas (R II 402).

These comments by the prosecutor and by the detectives were harmful and unduly prejudiced Appellant. They deprived him of a fair trial both individually and in concert with the other errors raised in this issue.

**Appearing In Front Of The Jury In Shackles And Jail Uniform**:

As a general rule, a defendant in a criminal trial has the right to appear before the jury free from physical restraints, such as shackles or leg and waist restraints. Bryant v. State, 785 So. 2d 422, 428 (Fla. 2001). Restraining a defendant with shackles in view of the jury adversely impacts an accused's presumption of innocence. Id. A defendant has a right not to stand trial in prison garb. Heiney v. State, 447 So. 2d 210, 214 (Fla. 1984). A criminal defendant cannot be compelled to stand trial in prison clothing because it impairs the defendant's presumption of innocence, which is a basic component of the fundamental right to a fair trial. Pineda v. State, 805 So. 2d 116, 117 (Fla. 4th DCA 2002). In addition, equal protection concerns are triggered because compelling the accused to stand trial in jail garb operates usually against only those who cannot post bail prior to trial. Id.

Here, Appellant, who was representing himself, was in court on the morning of jury selection in his jail uniform and shackles. The trial court, the State, and Appellant discussed multiple preliminary matters before the potential jurors were brought in ( R II 4-25). At no point did the trial court make Appellant aware that he did not have to wear his jail garb or shackles. The potential jurors were brought in and jury selection began with Appellant still in his jail uniform and shackles (R II 25-66). Prior to the lunch recess, Appellant asked the court to remove the shackles so

he could move around better (R II 66). The trial court told him that the sheriff's office controls the security and the court does not get involved in those decisions (R II 66). After the lunch recess but before the potential jurors were back in the courtroom Appellant asked the court if he could wear other clothes than the jail uniform (R II 66-68). The trial court then allowed him to change into some clothes the court had on hand (R II 66-68). After the trial, Appellant moved for a new trial citing the fact that he had appeared in front of the jury in shackles and a jail uniform (R I 173).

The trial court should have made Appellant, an indigent, incarcerated pro se defendant, aware that he did not have to wear the jail uniform and that the court had other clothes on hand for him if he needed them. Further, the court should have had court security remove Appellant's shackles before he appeared in front of the jury as nothing in the record indicated he was a security risk. Appearing in front of the jury in shackles and a jail uniform denied Appellant a fair trial as his presumption of innocence was damaged.

**Testimony That Appellant Was In A Database**:

Detective Canaday testified that he found Appellant's photo in a "known database" (R II 308). Detective Prescott testified that Appellant's photo came from "a database" (R II 341). Appellant's attorney did not object to either statement.

These statements implied to the jury that Appellant had a criminal record and was in a known database of criminal offenders. These comments prejudiced his presumption of innocence. These comments, in combination with Prescott's testimony that Appellant was in jail on other charges (discussed in Issue VI below) and Appellant's appearance in front of the jury in shackles and jail garb, deprived Appellant of a fair trial.

**ISSUE VI: The trial court erred by denying Appellant's motion for mistrial**.

Appellant preserved this issue when he moved for a mistrial after Detective Prescott testified that Appellant was in jail on other charges (R II 316). The trial court took the motion under advisement and later denied it (R II 400). The denial of a motion for mistrial is reviewed for abuse of discretion. Salazar v. State, 991 So. 2d 364, 371-72 (Fla. 2008). A motion for mistrial should only be granted when necessary to ensure that the defendant receives a fair trial. Id. at 372.

Appellant's right to a fair trial was compromised when Detective Prescott informed the jury that Appellant was in jail on other charges when he attempted to find him. The jury should never have known that Appellant had been accused of other crimes. This information damaged his presumption of innocence.

Defendants have a constitutional right to a trial by an impartial jury. Evans v. State, 36 So. 3d 185, 186 (Fla. 4th DCA 2010), citing Holt v. State, 987 So.2d 237, 239 (Fla. 1st DCA 2008). This right is violated when jurors are inadvertently informed that the defendant has other, pending charges. Id. citing Holt, 987 So.2d at 239-40 (reversible error where defendant was to be tried on a single count of armed robbery, but judge made comment indicating defendant was charged with two counts); Jackson v. State, 729 So.2d 947, 950-51 (Fla. 1st DCA 1998) (reversible

error where defendant was to be tried on single count and, in presence of jury, judge asked prosecutor whether he was proceeding on all four counts). This right is also violated where the jury is inadvertently informed that the defendant, whose guilt they are about to decide, is a convicted felon. See Richardson v. State, 666 So. 2d 223 (Fla. 2d DCA 1995). The trial court should have granted the motion for mistrial. This error alone deprived Appellant of a fair trial. It is especially prejudicial where, as here, the jury had already seen Appellant in shackles and a jail uniform. (See Issue V, above). The fact that the jury had already seen Appellant in shackles and a jail uniform does not lessen the impact of the detective's comment. The vision of Appellant in shackles and a jail uniform does not automatically equate to Appellant facing other criminal charges. The detective's comment informed the jury that Appellant had other criminal charges, which destroyed Appellant's presumption of innocence and his ability to receive a fair trial.

**ISSUE VII: The trial court erred by denying Appellant's motion for new trial.**

Appellant preserved this issue. Appellant's attorney filed a motion for new trial (R I 171). Appellant filed a pro se motion for new trial and a memorandum of law in support (R I 173, 201). Appellant's attorney adopted Appellant's pro se motion for new trial (R I 487-88). The trial court denied the motion (R I 244, 488-89). The denial of a motion for a new trial is reviewed for abuse of discretion. Collett v. State, 28 So. 3d 224, 226 (Fla. 2d DCA 2010).

Appellant raised the trial court's errors in allowing him to appear in front of the jury in shackles and a jail uniform, in terminating his right to self-representation, in denying his motion to continue the case to prepare for trial (R I 173-74), and in denying his motion for mistrial (R I 171). Each of these issues necessitated a new trial, and the court's denial of the motion was an abuse of discretion. The prejudice caused to Appellant by each of these errors is explained in Issues I through VI above.

## V. CONCLUSION

Pursuant to the arguments made and authorities cited, Appellant respectfully requests that he be granted a new trial.

## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished by electronic mail to Trisha Meggs Pate, Office of the Attorney General, at crimapptlh@myfloridalegal.com, on this date, May 25, 2017.

## CERTIFICATE OF FONT SIZE

I HEREBY CERTIFY that, pursuant to Rule 9.210 of the Florida Rules of Appellate Procedure, this brief was typed in Times New Roman 14 Point font.

ANDY THOMAS
PUBLIC DEFENDER
SECOND JUDICIAL CIRCUIT

/s/ Victor Holder
**VICTOR HOLDER**
ASSISTANT PUBLIC DEFENDER
FLORIDA BAR NO. 71985
LEON COUNTY COURTHOUSE
301 S. MONROE ST., SUITE 401
TALLAHASSEE, FLORIDA 32301
(850) 606-8500
Victor.Holder@flpd2.com

COUNSEL FOR APPELLANT