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IN THE

DISTRICT COURT OF APPEAL

FIRST APPELLATE DISTRICT OF FLORIDA

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| CHARLES ADELSON,<br><br>Appellant,<br><br>v.<br><br>STATE OF FLORIDA,<br><br>Appellee. | Case No. 1D24-0004<br>Direct Criminal Appeal<br>Second Circuit/Leon County<br>L.T. No. 2016-CF-3036 |

# INITIAL BRIEF OF APPELLANT

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### 1. Statement of the Case and Course of Proceedings Below.

Charles "Charlie" Adelson (hereinafter "Appellant Adelson") was charged in April of 2022 with first-degree murder, conspiracy to commit first-degree murder, and solicitation to commit first-degree murder for the 2014 killing of Dan Markel. (R-35-37).[1] Dan Markel was shot in Leon County on July 18, 2014, and he died on July 19, 2014. Three people were already serving prison sentences for the murder of Dan Markel at the time of Appellant Adelson's trial: Luis Rivera (no contest plea), Sigfredo Garcia (found guilty at trial in 2019), and Katherine Magbanua (found guilty at trial in 2022, after a hung-jury mistrial in 2019.)

At trial, Appellant Adelson was represented by Daniel L

[1] References to the record on appeal will be made by the designation "R" followed by the appropriate page number. References to the trial transcript will be made by the designation "T" followed by the appropriate page number (i.e., the number that appears in the upper right hand corner).

Rashbaum, Esquire,[2] and Kathryn "Kate" Meyers, Esquire. The State was represented by Assistant State Attorneys Sarah Kathryn Dugan and Georgia Cappleman. The Honorable Stephen Everett presided over the trial.

The trial began on October 23, 2023,[3] and concluded on November 6, 2023. At the conclusion of the trial, the jury found Appellant Adelson guilty as charged on all counts. (R-2080-2081).

The sentencing hearing was held on December 12, 2023. (R-2133-2152). The trial court sentenced Appellant Adelson to life in prison on the murder count, followed by 30 years' imprisonment on the other two counts. (R-2099).

**2. Statement of the Facts.**

**a. The State's Case in Chief.**

The State of Florida alleged that Appellant Adelson orchestrated

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[2] For all of the reasons set forth in the motion filed in this Court on October 16, 2024, undersigned counsel continue to assert that Mr. Rashbaum had a conflict of interest that infected Appellant Adelson's trial – and, if necessary, Appellant Adelson reserves the right to raise this conflict claim in a postconviction motion.

[3] The transcript of the jury selection proceeding is contained on pages 2209-3274 of the record on appeal.

the murder of Dan Markel, a Florida State University law professor, due to a bitter child custody dispute between Markel and Appellant Adelson's sister, Wendi Adelson. (T-25-62). The State claimed that Appellant Adelson hired hitmen Sigfredo Garcia and Luis Rivera, through Katherine "Katie" Magbanua, who was Appellant Adelson's then-girlfriend. (T-25-62). During opening statements, evidence previewed by the prosecution included wiretaps, financial transactions and a money trail, and Wendi Adelson's actions post-murder (i.e., relocating to South Florida very quickly, and changing the children's last name). (T-25-62). Appellant Adelson's defense disputed this interpretation, explaining that Appellant Adelson had not been involved in planning the murder, but had been extorted by the killers – Magbanua, Garcia, and Rivera – after the fact. (T-63-89).

Dan Markel was shot twice in the head on July 18, 2014, while in his vehicle in his garage on Trescott Drive in Tallahassee, Florida. (T-93-95, 140-41). Dan Markel and Wendi Adelson had been divorced, and even after the divorce was finalized in July 2013 (T-196-197), continued to have legal disputes regarding parenting, time-

sharing, financial, and other issues. (T-153-155). One of the issues involved Wendi Adelson's wish to relocate from Tallahassee to South Florida with her and Dan Markel's two children. (T-155). Wendi Adelson's request to relocate was denied by the court. (T-156-157). Emails between Wendi Adelson and her mother, Donna Adelson, indicated a continued desire – at least on the part of Donna – for Wendi and the children to relocate. (T-158-159). An email from Donna suggested that Wendi should offer Dan Markel $1 Million to allow her to move to South Florida with the children. (T-159). Donna's email suggested that the payment would be funded by Wendi's parents (i.e., Donna and Harvey Adelson), Wendi, and Appellant Adelson. (T-159).

On the morning of Dan Markel's murder, Markel dropped off his and Wendi's children at preschool, and then went to the gym. (T-161). Surveillance from the gym, city busses, and other locations showed a vehicle – a light green Prius – following Markel around town that morning. (T-161-163). Based on distinctive features of the vehicle, a Sun Pass transponder, and cell phone analyses, investigators

developed a suspect vehicle, and traced it to South Florida. (T-174-180). The vehicle was rented by Luis Rivera. (T-180-182). Sigfredo Garcia's phone number was also on the rental car agreement. (T-181-183). Sigfredo Garcia and Luis Rivera were known by the nicknames "Tuto" and "Tato," respectively. (T-184-185). Magbanua was romantically linked to Garcia, and they shared children. (T-674).

The Adelson Institute was a family-owned dental practice owned by Harvey Adelson and Appellant Adelson. (T-186, 769-770). Starting September 2014, Magbanua began receiving payments from the Adelson Institute, despite no evidence that she performed work duties there. (T-186-189, 822-825). The checks were in "batches" – meaning sequentially numbered, even though they were dated weeks apart. (T-191-193). There were 18 sequential checks made out to Magbanua. (T-825). Donna Adelson, who managed the dental practice, signed the checks made out to Magbanua. (T-822-823).

On the day Dan Markel was shot, Wendi Adelson told police that it was possible that her family could have been responsible. (T-235-236). Appellant Adelson bought Wendi Adelson a television as a divorce present. (T-274). He joked that he had looked into hiring a

hitman, but the television was cheaper. (T-272-274). On the morning of the shooting, the television that Appellant Adelson had bought Wendi Adelson was being repaired at her home, while Wendi Adelson was present. (T-274). There was a calendar event in Wendi Adelson's phone called "fix TV" on the morning of Dan Markel's shooting. (T-920).

Magbanua and Appellant Adelson had dated. (T-276-277, 565). When Magbanua was arrested for the murder of Dan Markel in 2016, Appellant Adelson became stressed. (T-510-511, 568). Donna Adelson also appeared stressed and upset around this time. (T-511-512). Appellant Adelson was implicated in the probable cause affidavit for Magbanua. (T-574). Appellant Adelson was known to staple his money together in bundles. (T-517, 522, 566).

Jeffrey LaCasse, who was dating Wendi Adelson around the time of the murder, testified that on July 13, 2014, Wendi Adelson told him in a serious tone and in confidence that Appellant Adelson had actually looked into hiring a hitman to kill Markel. (T-537-539). Wendi Adelson, who was called as a witness for the State, denied ever saying that to LaCasse. (T-532-533). Wendi Adelson and LaCasse

broke up about a week before Dan Markel was killed. (T-548-551). Lacasse was excluded as a suspect in the murder of Dan Markel because he was out of town on the day Markel was shot. (T-856).

At some point in July of 2014, Appellant Adelson was nearly run off the road by Sigfredo Garcia. (T-573, 677). Garcia was angry about Magbanua's relationship with Appellant Adelson. (T-644-645). Garcia blocked the road and yelled at Appellant Adelson and Magbanua in their vehicle. (T-676-677). Garcia hated Appellant Adelson. (T-749).

Luis Rivera was the head of the Latin Kings gang in North Miami Beach. (T-585, 657). He testified as a State's witness in all of the prosecutions for Dan Markel's murder – in exchange for a 19-year prison sentence (which would be served concurrent to a federal sentence he was already serving). (T-586-587). Rivera became involved in the murder of Dan Markel through a friend, Sigfredo Garcia. (T-588-589). Garcia came to know about this "job" to do the murder through Garcia's girlfriend, Magbanua. (T-589). Magbanua hired Garcia, and Garcia hired Rivera. (T-589). Magbanua was to get the money after the murder was done. (T-590). According to Rivera,

Magbanua got the money from "the dentists." (T-590). The money was split three ways, with Rivera getting $37,000. (T-593).

Rivera and Garcia came to Tallahassee once in June 2014 to commit the murder, but they lost track of Dan Markel while following him. (T-598-601). When they came to Tallahassee, they had a piece of paper with a photo of Dan Markel and his address. (T-599). During the subsequent July trip to Tallahassee, Rivera and Garcia learned through Magbanua that Dan Markel was leaving town the next day. (T-609-610). All of Garcia's knowledge came from Magbanua, and anything Garcia and Rivera did in connection with the murder had to be cleared through Magbanua. (T-634). Magbanua told Garcia that she would get back together with him if he did the murder for her. (T-643).

When they arrived at Markel's house, Rivera pulled the green Prius behind Markel's vehicle in the driveway, and Garcia got out and shot Markel twice. (T-611-613). Garcia called Magbanua after the murder. (T-615, 652). Magbanua told Garcia "you'll get the money tomorrow." (T-616). The next day, Rivera got $35,000 from

Magbanua in $100 bills, stapled together in bundles of a thousand dollars. (T-618-620). Garcia gave him $2,000 extra. (T-618-620).

Katie Magbanua was a State's witness. (T-664). She was convicted of the murder of Dan Markel, and she testified in her own defense in each of her two trials and claimed not to be involved in the murder, conspiracy, or solicitation. (T-664-665). She also testified at Sigfredo Garcia's trial that Garcia had nothing to do with the murder. (T-665). Pretty soon after Magbanua was arrested, she was offered to cooperate against Appellant Adelson in exchange for full immunity, or a "get-out-of-jail-free card." (T-704). She did not accept the offer. (T-704-705).

In Appellant Adelson's trial, Magbanua testified that Appellant Adelson came up with the idea to kill Dan Markel sometime around Halloween of 2013. (T-670). By that time, Appellant Adelson and Magbanua had been dating about two weeks. (T-742). According to Magbanua, although Appellant Adelson solicited Magbanua to find someone to kill Markel, he did not know it was her child's father (Garcia) that she had enlisted. (T-673-675). Likewise, Garcia did not know that he was doing the murder to help out Appellant Adelson. (T-

676-678). Magbanua provided Garcia and Rivera with money for expenses for the trips to Tallahassee. (T-681). Magbanua got the money for the murder from Appellant Adelson the morning after the murder. (T-686). The money was stapled. (T-686-687). According to Magbanua's trial testimony, the money was moldy, and she believed it may have been physically washed by Donna Adelson (given that Appellant Adelson never had money in his house), and she believed that Appellant Adelson's parents had stopped by the house before she got there. (T-687). Magbanua took the money and paid Rivera and Garcia. (T-691).

After the murder, Rivera bought a motorcycle and Garcia bought three cars. (T-802-806). Magbanua acquired a Lexus that was previously owned by Harvey Adelson. (T-811). Magbanua received $2,000 a month from the Adelson Institute beginning in October 2014. (T-847-848).

The State introduced call records to show incoming and outgoing calls between Appellant Adelson and Magbanua – and Magbanua and Garcia, and Appellant Adelson and his parents' home – during the

timeframe of the "significant events" in this case. (T-893-895). According to State's expert Sergeant Chris Corbitt, the phone call records showed the "physical acts" of the co-conspirators because they occurred during the car rental, the trips to Tallahassee, and the return after the murder of Markel. (T-894). Additionally, call turn-around – meaning one of the co-conspirators ended a phone call with one co-conspirator and then immediately called another co-conspirator – "stood out" to investigators. (T-894-895). For example, the expert testified that Magbanua talked to Appellant Adelson on the phone for 25 minutes after dropping off Garcia at the rental car agency. (T-897). Then, after the call with Magbanua ended, Appellant Adelson called his parents' landline. (T-897). Another example is that during the June trip that Rivera and Garcia made to Tallahassee, from June 2 to June 5, Appellant Adelson contacted Magbanua ten times, Magbanua contacted Garcia twelve times, Magbanua contacted Appellant Adelson seven times, and Appellant Adelson contacted Donna Adelson five times. (T-903-905). On the morning of Dan Markel's murder, there were calls from Appellant Adelson to Wendi

Adelson, Appellant Adelson to Donna Adelson, and Appellant Adelson to Magbanua. (T-921). After the murder – during which Rivera and Garcia's phones were possibly turned off – the first call that Garcia made was to Magbanua. (T-925).

Investigators secured a wiretap in 2016 to listen to the calls made between the alleged co-conspirators in real time. (T-948). Appellant Adelson's and Magbanua's phones were among the lines tapped. (T-951). On April 19, 2016, Donna Adelson was approached in the street by an undercover officer and handed a piece of paper with an article about Dan Markel's murder. (T-952). This operation was known during the trial as "the bump." (T-952). During "the bump," an FBI agent portrayed a Latin King gang member who wanted money for his continued silence about Dan Markel's murder. (T-1067-1068). The interaction was video and audio recorded and played for the jury. (T-1070-1071).

Donna Adelson's first outgoing call after "the bump" was to Appellant Adelson. (T-952, 1154-1175). Later, the undercover FBI agent, portraying the same character, made a phone call to the dental

practice on April 28, 2016. (T-1072). After "the bump," Appellant Adelson called Magbanua and gave her the phone number from the paper that the undercover FBI agent had given Donna Adelson. (T-700, 1176-1184). Magbanua never called the number, but told Appellant Adelson that she did. (T-760). Magbanua actually told Garcia to call the number. (T-760-761). On April 28, 2016, Appellant Adelson called the number and spoke to the undercover agent. (T-1079). The Adelsons did not pay the money that the FBI agent had solicited from Donna Adelson. (T-1077).

An in-person conversation between Appellant Adelson and Magbanua was recorded by the FBI at a restaurant north of Miami Beach. (T-1085-1089). A forensic engineer "processed" and "enhanced" the recording from that restaurant, and one other recording of Appellant Adelson with Harvey Adelson in a different restaurant. (T-1098-1102). Other phone calls between Appellant Adelson and Donna Adelson that were obtained from the wiretap were published to the jury. (T-1131-1147).

**b. Appellant Adelson's Case in Chief**.

Appellant Adelson testified in his defense. (T-1525-1977). He

asserted that he had nothing to do with Dan Markel's murder, and that he found out that the murder was done by a "friend" of Magbanua's on the night after it was committed. (T-1617-1619). Magbanua told Appellant Adelson that if he did not pay the killers, through Magbanua, he would be killed. (T-1619). Appellant Adelson told Magbanua that he felt like he was being extorted, and Magbanua became angry and said she was not trying to extort him – she was trying to help him. (T-1619). Magbanua said the murder was "her fault" because she talked about the cash offer that the Adelsons were going to make to Dan Markel to allow Wendi Adelson and the children to relocate. (T-1619). Magbanua took $138,000 in cash out of Appellant Adelson's safe. (T-1620-1621). Magbanua asked if Appellant Adelson could make monthly payments towards "the rest" of the third of a million dollars, and Appellant Adelson agreed. (T-1621). Magbanua called "her friend" about the arrangement, who indicated that payments of $3,000 a month could be made, but those payments would not offset the balance "owed." (T-1622). Appellant Adelson believed that Magbanua was not part of the extortion plot and

that she did not know the murder would happen. (T-1621).

Aside from Wendi Adelson's divorce attorney, no other defense witnesses were called. (T-1490-1512).[4]

[4] Donna and Harvey Adelson were removed as defense witnesses by defense counsel – after they were ordered by the trial court to appear for an interview by the FBI on October 12, 2023. (R-3275-3290).

## D. SUMMARY OF ARGUMENT

Appellant Adelson raises five claims on appeal. First, the trial court erred when by denying Appellant Adelson's motion for a change of venue. During the jury selection process, after attempting to select a jury, it became clear that it was not possible to convene a fair and impartial jury because of the extensive pretrial publicity – i.e., because the Tallahassee community was "so pervasively exposed to the circumstances of the incident [that] . . . prejudice, bias, and preconceived opinions [were] the natural result." *Manning v. State*, 378 So. 2d 274, 276 (Fla. 1979). Notably, prior to jury selection, 54 potential jurors had already formulated an opinion about the guilt or innocence of Appellant Adelson – and *53 of them* believed that Appellant Adelson is *guilty*.

Second, the trial court abused its discretion when it denied Appellant Adelson's motion to strike the venire panel after several potential jurors reported to the court and the parties that other potential jurors were having conversations together – about the case – after being instructed not to do so. In fact, there were *multiple*

accounts of potential jurors talking about the case, and some of the jurors who had been discussing the case were the same jurors who held a preconceived belief that Appellant Adelson is guilty – and some of the comments that were reported *were expressions of Appellant Adelson's guilt*. Therefore, the trial court's refusal to strike the jury venire was unreasonable based on the record in this case.

Third, the trial court erred by precluding the defense from entering text messages that would have shown that Appellant Adelson and his alleged co-conspirators were communicating "normally" during the time of the first attempt on Dan Markel's life – to rebut the State's contention that Appellant Adelson and the alleged co-conspirators were making phone calls about the murder during the time in question. The excluded text messages tended to establish a reasonable doubt as to Appellant Adelson's guilt. The State was permitted to show the jury that phone calls occurred between the alleged co-conspirators, and to argue that the fact that the alleged co-conspirators were communicating on certain dates showed that they were conspiring about, or at least discussing, the murder. The

defense wanted to show the *actual substance of the text messages* to the jury to *negate* the State's assertion that these alleged co-conspirators were discussing the murder, and that the substance of the messages was in fact *not about the murder* – but were about "normal" things.

Fourth, the trial court improperly excluded relevant, excepted-hearsay evidence that was highly probative to the theory of defense – i.e., a recorded phone call where Appellant Adelson made the statement that he had been extorted in the past and this is not how extortion works. The statement of Appellant Adelson that "this is not how [extortion] is done" was *not* being offered to prove the truth of the matter asserted – that is, that extortion is not done in the particular way that the FBI was doing it. Rather, the statement was to be used to show that Appellant Adelson believed that the police were behind "the bump" extortion, because he had been previously extorted by Dan Markel's killers.

Finally, the cumulative effect of the errors in this case denied Appellant Adelson a fair and impartial trial.

## E. ARGUMENT AND CITATIONS OF AUTHORITY

### 1. The trial court erred when by denying Appellant Adelson's motion for a change of venue.

#### a. Standard of Review.

A trial court's ruling denying a motion for a change of venue is reviewed on appeal pursuant to the abuse of discretion standard of review. *See State v. Knight*, 866 So. 2d 1195, 1209 (Fla. 2003).

#### b. Argument.

During the jury selection process, after attempting to select a jury, it became clear that it was not possible to convene a fair and impartial jury because of the extensive pretrial publicity – i.e., because the Tallahassee community was "so pervasively exposed to the circumstances of the incident [that] . . . prejudice, bias, and preconceived opinions [were] the natural result." *Manning v. State*, 378 So. 2d 274, 276 (Fla. 1979).

Both the Florida Constitution and the United States Constitution protect a defendant's right to a fair trial by an impartial jury. *See* U.S. Const. amend. VI; Art I., § 16, Fla. Const.; *United States v. Cabrales*, 524 U.S. 1 (1998) ("The Constitution . . . safeguards the defendant's

venue right."). As explained by the Florida Supreme Court in *Rolling v. State*, 695 So. 2d 278, 284 (Fla. 1997):

> It is a well-settled principle under our caselaw that a criminal trial may be held in a county other than that designated by the constitution or by statute if prejudice in the proper county makes it impossible for a defendant [] to secure a fair trial by an impartial jury there. Such prejudice may warrant a change of venue when widespread public knowledge of the case in the proper county causes prospective jurors there to judge the defendant with great disfavor because of his character or the nature of the alleged offense. When this occurs, the defendant's right, under the United States and Florida Constitutions, to a fair trial by an impartial jury is protected by moving the trial from the proper, but partial county, to an impartial one.

(Citation omitted). A trial judge is *bound* to grant a motion for a change of venue 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. *See Manning*, 378 So. 2d at 276.

In *McCaskill v. State*, 344 So. 2d 1276, 1278 (Fla. 1977), the Florida Supreme Court announced the test for determining whether a change of venue is required because of prejudice in the proper county:

> The test for determining a change of venue is 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.

(Quoting *Kelley v. State*, 212 So. 2d 27, 28 (Fla. 2d DCA 1968)). In exercising its discretion, a trial court must make a two-pronged analysis, evaluating: (1) the extent and nature of any pretrial publicity; and (2) the difficulty encountered in actually selecting a jury. *See Murphy v. Florida*, 421 U.S. 794 (1975). On appeal, this Court has "the duty to make an independent evaluation of the circumstances." *Sheppard v. Maxwell*, 384 U.S. 333, 362 (1966).

During the jury selection process in Appellant Adelson's case, the trial court interviewed **130** potential jurors, one-on-one, to assess their knowledge and opinions about the case. (R-2209-3006). Of those interviewed, **96** had heard about the case. (R-2209-3006). And of those who had heard about the case, **54** had formed an opinion about it. (R-2209-3006). Of those who had formed an opinion about the case, **53** believed Appellant Adelson was guilty. (R-2209-3006). In other words, *only one single potential juror* who held an opinion

about Appellant Adelson's guilt *believed he was not guilty or could have been wrongfully charged.* (R-2638-2640, 2706).

During the potential juror interviews, the jurors stated that the sources of their knowledge about the case included the Tallahassee Democrat, local news broadcasts, cable news specials like 20/20 and Dateline, Court TV broadcasts, CNN, podcasts, YouTube, radio, social media, documentaries, neighbors, friends, parents, co-workers – and some who stated that they had watched the co-conspirators' trials. (R-2209-3006). Several jurors explained the notoriety of the case: "I've been around long enough in town to know it." (R-2644). Another colorfully put it:

> It's a tragedy it's been over this community as long as it has. *I mean, you'd have to live under a rock not to know about it.* I don't really know more than the average citizen. Just what you hear, you know? But, like I said, I know it's been ongoing for quite a while. And it's just a tragedy it's taken this long to find peace for the family.

(R-2499-2500) (emphasis added). Yet another expressed that she consumed media about the case "[e]very chance I got, really" and that the impact it had on her is that "it sticks to your mind." (R-2547).

Juror after juror confirmed that the media they consumed had

taken the position that Appellant Adelson is guilty, or was involved somehow in the murder. (R-2413; 2767; 2779; 2803; 2820-2821; 2829; 2840). Most troubling, however, is the fact that of all the jurors who had already formed an opinion about Appellant Adelson's guilt or innocence – totaling over 50 jurors – *all but one* of them held the view that he is guilty:

> [(R-2257):] THE COURT: Based on the information that you know, have you formed an opinion concerning Mr. Adelson's guilt or innocent?
>
> PROSPECTIVE JUROR: Somewhat. Probably. Yeah. More of bias.
>
> . . . .
>
> THE COURT: What is that opinion?
>
> PROSPECTIVE JUROR: *Probably he's guilty*.
>
> . . . .
>
> [(R-2343):] MR. DUBIN [defense counsel]: And what is that opinion?
>
> PROSPECTIVE JUROR: *I think he's guilty*.
>
> . . . .
>
> [(R-2392-2394):] THE COURT: Based on what you do know about this matter, have you formed any opinion as to

the guilt or innocence of Mr. Adelson?

PROSPECTIVE JUROR: Well, I was kind of shocked to learn that the trial was still going on because, you know, based on everything I read, I *kind of thought he was guilty and it was already done. You know, or at least assuming this is who I think it is, you know, the brother of the wife*.

THE COURT: But you believe that he is guilty in some manner?

PROSPECTIVE JUROR: Well, I mean, I thought he had already been convicted. So, I mean, I guess my mind already thinks that.

THE COURT: Are you able to set aside any knowledge that you've previously learned about this matter and disregard it and render a verdict solely on what will be presented in court as evidence?

PROSPECTIVE JUROR: I mean, may be difficult just because of, you know, how much this has come up over the last several years. You know, I like to think I could. But honestly, you know, we all have stuff in the back of our mind.

THE COURT: I understand what you're telling me as just conversation speech, but it is somewhat equivocal. I'm going to need a more specific answer. Are you capable of disregarding this information and rendering a verdict only on what you will hear as evidence in the courtroom?

PROSPECTIVE JUROR: No. That would be difficult.

. . . .

[(R-2481-2482):] MR. DUBIN: Well, I'm asking you.

PROSPECTIVE JUROR: Yeah. I mean, you know, this has been going on for so long. Honestly, we all have opinions on it.

MR. DUBIN: Yeah.

PROSPECTIVE JUROR: And being a local, we do. So we kind of formulate opinions. But at the same time, I understand that this is very serious. So if there's actually evidence that shows this could not have happened, I'd be open to that.

MR. DUBIN: You'd be open to that?

PROSPECTIVE JUROR: Yeah.

MR. DUBIN: *But your current position is that you think he's guilty.*

PROSPECTIVE JUROR: *Yeah.* And I only know what's in the newspaper. I don't know if that's right or correct or not.

. . . .

[(R-2484):] THE COURT: Very well. Based on your knowledge of this matter, have you formed an opinion as to Mr. Adelson's guilt or innocence?

PROSPECTIVE JUROR: I think he has a fair amount of significant implication on this. *Is he guilty? I cannot say. That would be my leaning, I can say that.*

. . . .

[(R-2495):] MR. DUBIN: I'm asking you, *is it fair to*

*say that your starting point is that he's probably guilty*?

PROSPECTIVE JUROR: *That would be my starting point, yes*.

. . . .

[(R-2521-2523):] THE COURT: All right. Based on what you know at this time, do you have an opinion about Mr. Adelson's guilt or innocence?

PROSPECTIVE JUROR: Yes.

THE COURT: What is your opinion?

PROSPECTIVE JUROR: *I think he's guilty*.

. . . .

MR. DUBIN: . . . And your words were, I think he's guilty. And that's fine. Just tell me why – why you came to that conclusion?

PROSPECTIVE JUROR: Based on what I've heard in the news so far.

. . . .

[(R-2531):] THE COURT: Based on everything that you know, do you have an opinion about Mr. Adelson's guilt or innocence?

PROSPECTIVE JUROR: I do have an opinion.

THE COURT: What is your opinion?

PROSPECTIVE JUROR: *Guilty*.

THE COURT: Are you able to disregard this opinion?

PROSPECTIVE JUROR: I am not.

. . . .

[(R-2543):] THE COURT: Based on what you know, do you have an opinion about Mr. Adelson's guilt or innocence?

PROSPECTIVE JUROR: Just what I saw on TV.

THE COURT: Okay. That does not exactly answer the question. Do you have an opinion from what you saw on television, concerning Mr. Adelson or his guilt or innocence?

PROSPECTIVE JUROR: *Everything points to guilty*.

. . . .

[(R-2552):] THE COURT: Have you formed an opinion, based on what you've learned or what you know, concerning Mr. Adelson's guilt or innocence?

PROSPECTIVE JUROR: I would have to say yes.

THE COURT: What is that opinion?

PROSPECTIVE JUROR: *Probably guilty*.

. . . .

[(R-2593):] THE COURT: Based off what you know about the matter from either the podcast or the news reporting, do you have an opinion about Mr. Adelson's guilt

or innocence?

PROSPECTIVE JUROR: I think I do, yeah.

THE COURT: What is that opinion?

PROSPECTIVE JUROR: *I think he's guilty*.

THE COURT: Are you capable of disregarding this opinion –

PROSPECTIVE JUROR: No.

THE COURT: – or is it firmly entrenched?

PROSPECTIVE JUROR: No, I don't think I could disregard it. I don't think it would be right for me to serve on the jury.

. . . .

[(R-2623):] THE COURT: Based on what you know, do you have an opinion about Mr. Adelson's guilt or innocence?

PROSPECTIVE JUROR: I do.

THE COURT: What is your opinion?

PROSPECTIVE JUROR: *Guilty*.

. . . .

[(R-2630):] PROSPECTIVE JUROR: Yes, I have opinions.

THE COURT: Please share them.

PROSPECTIVE JUROR: Oh, my goodness.

THE COURT: Turn your back around again.

PROSPECTIVE JUROR: As far as – you said as far as guilty or innocence?

THE COURT: Yes. Do you have opinions on that subject matter specifically?

PROSPECTIVE JUROR: Yes, sir. *I would say he's guilty*.

. . . .

[(R-2632):] THE COURT: Based on those discussions or what you know, have you formed an opinion?

PROSPECTIVE JUROR: I have.

THE COURT: What is that opinion?

PROSPECTIVE JUROR: *Guilty*.

THE COURT: And is this a firm opinion or one that you believe you can disregard?

PROSPECTIVE JUROR: I'm about 90 percent.

. . . .

[(R-2636-2637):] THE COURT: Based on what you've learned or what you already know, do you have an opinion as to the Defendant's guilt or innocence?

PROSPECTIVE JUROR: Unfortunately, yes.

THE COURT: What is that opinion?

PROSPECTIVE JUROR: *Guilty*.

. . . .

[(R-2675):] THE COURT: All right. Based on that podcast and what you learned from it, did you form an opinion about Mr. Adelson's guilt or innocence?

PROSPECTIVE JUROR: I did.

THE COURT: What is your opinion?

PROSPECTIVE JUROR: *From the podcast, guilty*.

. . . .

[(R-2701):] THE COURT: Okay. Based on what you've learned through either the news reports or other sources, have you formed an opinion on Mr. Adelson's guilt or innocence?

PROSPECTIVE JUROR: Pretty much so.

THE COURT: What is your opinion?

PROSPECTIVE JUROR: *That he is guilty*.

. . . .

[(R-2714-2715):] THE COURT: Okay. So other than what you've learned through the local news, do you have an opinion at this point as to Mr. Adelson's guilt or innocence?

PROSPECTIVE JUROR: Being honest?

THE COURT: That's what we need from you.

PROSPECTIVE JUROR: Everything that I hear, *he's guilty, in my opinion*.

. . . .

[(R-2733):] THE COURT: Based on what you've learned either through internet articles or other means, do you have an opinion as to Mr. Adelson's guilt or innocence?

PROSPECTIVE JUROR: I have formed my own opinion by what I've read.

THE COURT: What is that opinion?

PROSPECTIVE JUROR: From what I've read, *I think that he's guilty*.

. . . .

[(R-2757):] THE COURT: You've done nothing wrong. You were under no instructions from the Court or anyone else. Based on everything that you know, do you have an opinion concerning Mr. Adelson's guilt or innocence in this matter?

PROSPECTIVE JUROR: Yeah.

THE COURT: What is your opinion?

PROSPECTIVE JUROR: *He's guilty*.

. . . .

[(R-2802-2803):] THE COURT: Okay. And from what you Googled and what you learned, do you have any

opinions concerning Mr. Adelson's guilt or innocence?

PROSPECTIVE JUROR: I do.

THE COURT: Please share that opinion with us.

PROSPECTIVE JUROR: I mean, *I'm leaning more towards guilty* because just reading the details for like how everything worked out and who's already been convicted.

. . . .

[(R-2807):] THE COURT: Based on what you know, do you have an opinion as to Mr. Adelson's guilt or innocence?

PROSPECTIVE JUROR: *I would think he's guilty*.

THE COURT: So you believe he's guilty?

PROSPECTIVE JUROR: Yeah.

. . . .

[(R-2840):] THE COURT: Based on what you learned from the podcast, do you have an opinion about Mr. Adelson's guilt or innocence?

PROSPECTIVE JUROR: *I think he's guilty*.

. . . .

[(R-2846):] THE COURT: Okay. Based on what you know, do you have an opinion about Mr. Adelson's guilt or innocence?

PROSPECTIVE JUROR: *I think he's guilty*.

THE COURT: Is this a firm belief or is this something that you're capable of setting aside and disregarding?

PROSPECTIVE JUROR: I don't know, I just – I know when I was reading about it, *I felt pretty sure he was guilty*.

. . . .

[(R-2848):] PROSPECTIVE JUROR: I'm very well informed about the case.

THE COURT: All right. Is this through your professional capacity as mayor or just through other means?

PROSPECTIVE JUROR: No, just media, talk about town.

THE COURT: Okay. Do you regularly watch the news or read the Democrat?

PROSPECTIVE JUROR: Are they here? Yes. Yes.

THE COURT: Okay. Have you recently consumed any information about this case?

PROSPECTIVE JUROR: I have.

THE COURT: Based on what you know, do you have an opinion as to Mr. Adelson's guilt or innocence?

PROSPECTIVE JUROR: Yes.

THE COURT: What is that opinion?

PROSPECTIVE JUROR: *Guilty*.

THE COURT: And is this a firm opinion or are you capable of setting it aside and disregarding it?

PROSPECTIVE JUROR: Pretty firm.

(Emphasis added).

In light of the dozens of prospective jurors who admitted to being exposed to publicity about the case and, as a result, having formulated the opinion that Appellant Adelson is guilty, defense counsel moved for a change of venue:

> MR. DUBIN: Your Honor, just for the record, I'm going to make a motion for a change of venue at this time. I think that voir dire has demonstrated that it's impossible for Mr. Adelson to get a fair trial in the city of Tallahassee. I know that some folks have passed through certainly not anything less than a very rigorous process which the Defense certainly appreciates, but I think as demonstrated by the answers from the mayor of the city, right down to the citizens of the county, that there is not a single person, except for one man whose opinion I discount, that has walked back here and said anything other than this man is guilty, that he's guilty, that he's guilty.
>
> I think that there have been a number of people that have been exposed to media attention that are still in the pool that have expressed that they have been exposed to media about the case and then represented to the Court that they have an opinion. I frankly find that– not that they're intentionally trying to deceive the Court – I just find it near impossible given the weight and saturation of the

media attention in this case.

So we would respectfully ask that this Court move these proceedings to a town that there has not been as much coverage of the case.

THE COURT: Where would your suggested venue be?

MR. DUBIN: My suggested venue would be somewhere in South Florida, somewhere in the middle of the State, somewhere where the Tallahassee Democrat doesn't have the circulation that it has and WCTV is not the local TV station. I'll leave that in the Court's discretion.

THE COURT: State?

MS. CAPPLEMAN [the prosecutor]: I disagree, Your Honor. In less than two days, we've got 60 jurors that have passed the test on publicity and we're ready to go to the next phase.

THE COURT: I will find in examining the prospective jurors individually that some of them have indicated they have no exposure to this case whatsoever– I cannot give a specific number count – however, I believe the record will bear this out. And, additionally, the other jurors who have had either exposure to the local media or have indicated some form of an opinion, they have indicated that they will follow the law and they will render a verdict that's based solely on the evidence.

On those grounds, I will not find that the pretrial publicity is such that the change of venue motion must be granted, and I am going to deny it at this time.

(R-2851-2853).

The trial court should have granted the motion for change of venue. As explained by the Florida Supreme Court in *Manning*:

> Our state and federal constitutions guarantee to criminal defendants a right to a fair trial by an impartial jury. As this Court noted in *Singer v. State*, 109 So. 2d 7, 14 (Fla. 1959):
>
> Every reasonable precaution should be taken to preserve to a defendant trial by such a jury and to this end if there is reasonable basis shown for a change of venue a motion therefor 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 retrial 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.

*Manning*, 378 So. 2d at 277 (citation omitted). The motion for change of venue in this case "was amply supported by evidence which established that the community was so pervasively exposed to the circumstances of this incident that the defendant could not secure a fair and impartial trial" in Tallahassee, Florida. *Manning*, 378 So. 2d at 276. The record further reflects, and at least one juror admitted (R-2481-2482), 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." *Id.*

Based on the individual prospective juror voir dire, it was clear that the community was *pervasively exposed* to the circumstances of this case, and that prejudice, bias, and a preconceived opinion was the *natural result*. *See Manning*, 378 So. 2d at 276. In accordance with *McCaskill*, the motion should have been granted because the minds of the citizens of the Tallahassee community were infected by knowledge of the crimes – such that they could not possibly put it out of their minds. The jury selection process established the extensive – and highly prejudicial nature – of pre-trial publicity, and the difficulty in actually selecting a jury.

This Court has "the duty to make an independent evaluation of the circumstances." *Sheppard*, 384 U.S. at 362. In doing so, Appellant Adelson urges the Court to review the jury selection transcript in its entirety to fully understand the pervasiveness of the pretrial publicity and its effect on the potential jurors and the community at large. Additional areas in the record for this Court's

independent evaluation of the circumstances are as follows:

- During jury selection, the trial court specifically asked potential jurors to name the sources from which the potential jurors had received their information – and their answers reflected an expansive array of sources. This question was asked on the basis of Appellant Adelson's "Motion to Use a Juror Questionnaire," which also cited the extensive and extraordinary media coverage of this case as the basis for its need. (R-266-268; R-2190-2193) ("Over the last nine years, this case has quite literally generated thousands of print and online news articles, network and cable specials, podcasts, roundtable discussions, and YouTube videos, each spawning hundreds (if not more) of online comments from the public.").

- Further record evidence of the intense and enduring media coverage of this case is available for this Court's review in Appellant Adelson's "Defendant Charles Adelson's Unopposed Motion for Protective Order." (R-166-169; Response in Opposition at R-174-185). At that hearing (R-200-227), the parties agreed that the media coverage was "extraordinary" (R-204), and the State went on record to argue that ensuring Appellant Adelson's right to a fair trial was of the utmost importance, and accordingly, the protective order was necessary:

> MR. EVANS [the prosecutor]: Your Honor, just like I said, we are not opposed to the motion. Our primary purpose is and focus is, as the Court's is in considering this, that we want to ensure the Defendant has his constitutional right to a fair trial, and we would want to do everything we

> could to avoid any possible change of venue in this case. It needs to be tried here in Leon County.

(R-206). In making its ruling on the Motion for Protective Order, the trial court made the following findings:

> The Court has reviewed the interviews; and as Mr. Rashbaum noted, this is a balancing test. For the sealing of the evidence there must be an overriding interest that is likely to prejudice– to be prejudiced if the items are released to the public. There needs to be a serious and imminent threat to the administration of justice as Mr. Tobin has noted.
>
> In this case, that interest is the Defendant's right to a fair trial by an impartial jury. The Court recognizes the public's right to the public record. But in this case, the Defendant's need for a fair and impartial jury overrides that public interest.
>
> It is the responsibility of the judicial branch to ensure that all parties receive a fair trial. As Mr. Tobin noted, there is a three-part test in the *Miami Herald versus Lewis* case that the Court must adhere to, and that three-part test is met for the sealing of these proffers.
>
> Number one, *there has been a wealth of pretrial publicity. It's a well-known case, particularly in this*

> *community.*
>
> Number two, the public disclosure of that discovery material would further aggravate the pretrial publicity. *It would draw attention to this case, particularly in this community.*
>
> And, number three, the only measure available to the Court until a jury is selected is to cut off the potentially prejudicial publicity at its source before it is disclosed to the public.
>
> *The disclosure of these discovery materials would be big news in this small community*, potentially infecting the entire jury pool, even those who at this point may be acceptable jurors. Those without an opinion at this time may form an opinion, thereby reducing the jury pool drastically.
>
> This sealing is limited as much as practicable until Ms. Magbanua testifies at trial or until the conclusion of the trial. So, in short, the sealing is necessary to prevent a threat to the administration of justice. There is no other alternative that is available, and the sealing is no broader than necessary to accomplish this purpose. Therefore, the motion is granted."

(R-218-219).

To be sure, the trial court was so concerned about the media

attention, *in the small community of Tallahassee*, that it granted Appellant Adelson's request for a protective order, citing that the case is well-known, and the media coverage so pervasive, *particularly in this community*, that it threatened the fair administration of justice. In doing so, the court confirmed Appellant Adelson's fear that he could not receive a fair trial "in the small community of Tallahassee."

In *Patton v. Yount*, 467 U.S. 1025, 1031 (1984), the United States Supreme Court "granted certiorari to consider . . . the problem of pervasive media publicity that now arises so frequently in the trial of sensational criminal cases." The United States Supreme Court held that the "relevant question is not whether the community remembered the case, but whether the jurors at Yount's trial had such fixed opinions that they could not judge impartially the guilt of the defendant." *Id.* at 1035 (quoting *Irvin v. Dowd*, 366 U.S. 717, 723 (1961)).

Most relevantly, here, is the fact that 54 potential jurors had, prior to jury selection, already formulated an opinion about the guilt or innocence of Appellant Adelson, and *53 of them* believed that

Appellant Adelson is *guilty*. This statistic speaks volumes to both the extent of publicity and *its prejudicial effect*. The question from *Patton* – in evaluating juror prejudice, whether the jurors had such fixed opinions that they would not judge impartially the guilt of the defendant – must be answered in the affirmative. Additionally, in some instances, "the percentage of prospective jurors professing an extrinsic knowledge of the case or a fixed opinion has been used to determine whether pervasive community prejudice exists." *Rolling*, 695 So. 2d at 285. In *Murphy*, a case from Florida, the United States Supreme Court evaluated these percentages as follows:

> In the present case, by contrast, 20 of 78 persons questioned were excused because they indicated an opinion as to petitioner's guilt. This may indeed be 20 more than would occur in the trial of a totally obscure person, but it by no means suggests a community with sentiment so poisoned against petitioner as to impeach the indifference of jurors who displayed no animus of their own.

*Murphy*, 421 U.S. at 803 (footnote omitted). The Florida Supreme Court in *Rolling* explained that, consistent with the *Murphy* rationale, Florida courts have found in other cases, where similar percentages

of prospective jurors voiced a bias during voir dire, that "a change of venue was not required because the partiality of certain individual venire members did not reflect a pervasive prejudice infecting the entire community." *Rolling*, 695 So. 2d at 285-286. Here, though, of the more than four dozen potential jurors who had formed an opinion about Appellant Adelson's guilt – based on their exposure to the media or merely just having been "around long enough in town to know it" – *all but one* had a pre-conceived opinion that Appellant Adelson is guilty:

> MR. DUBIN: Yeah, I understand, Your Honor. It's just that you saying that he's innocent is oftentimes disconnected with how they feel, and how they feel is that – there hasn't been a single – not a single prospective juror, not one in a marathon session yesterday, that said, I read about the case, and you know what, I think that they have wrongfully accused him. The media –
>
> THE COURT: *There actually was one.*
>
> MR. RASHBAUM: There is *the one.*
>
> MR. DUBIN: If you're going to rely on that, I'll repeat what I said. *There wasn't one rational person who came in here yesterday and said, boy, I read the media, and they – I think they got the wrong guy.* The media has been – it has been an avalanche of accusations and inference about this

man's guilt. I think I've made my record. . . .

(R-2706) (emphasis added).

Further, "[a]dverse pretrial publicity can create such a presumption of prejudice in a community that the jurors' claims that they can be impartial should not be believed." *Patton*, 467 U.S. at 1031 (discussing the holding in *Irvin*, 366 U.S. 717). It is entirely realistic, on this record, to imagine that a juror's assertion, either that they have no information about the case or have not formed an opinion, is not to be believed, because there were at least two instances where a juror lied to the court about his pre-conceived opinion as to the guilt of Appellant Adelson:

> THE COURT: Based on what you already know, have you formed any opinions as to the guilt or innocence of Mr. Adelson?
>
> PROSPECTIVE JUROR: I don't know anything about him.
>
> THE COURT: Can you set aside whatever knowledge that you have obtained in the past, disregard it and render a verdict solely on what will be presented as evidence in this case?
>
> PROSPECTIVE JUROR: Sure. Yes. Sure.
>
> THE COURT: Do you believe that you're capable of

being fair and impartial as a juror?

PROSPECTIVE JUROR: Yes.

THE COURT: Is there anything that will prevent you, hardship-wise, from serving as a juror for possibly three weeks?

PROSPECTIVE JUROR: No.

. . . .

MR. DUBIN [continuing the questioning of the same prospective juror]: Sir, have you ever posted anything to social media about this case?

PROSPECTIVE JUROR: No.

MR. DUBIN: You sure about that?

PROSPECTIVE JUROR: Pardon?

MR. DUBIN: Are you sure about that?

PROSPECTIVE JUROR: Yeah I think – I mean, this was – how many years? What, 2014, I think is what someone said in there today.

THE COURT: That was part of the statement of the case.

PROSPECTIVE JUROR: Yeah, part of the statement. Okay, 2014. So, yeah, I don't – yeah, I don't think I have.

MR. DUBIN: Might you have and just don't remember it or –

PROSPECTIVE JUROR: Gosh, there's a lot of things I may not remember from 2014. I mean–

MR. DUBIN: Let me ask you this, Mr. [redacted]– let me ask you this –

. . . .

[MR. DUBIN]: Do you recall posting something where you talked specifically about Mr. Adelson and ending his life?

PROSPECTIVE JUROR: Ending his life?

MR. DUBIN: Yes.

PROSPECTIVE JUROR: No.

MR. DUBIN: Can I have the prospective juror step out for a moment and speak to the Court?

THE COURT: That's fine. Bailiff, you can escort Mr. [REDACTED] out. We'll call you back in a moment.

. . . .

MR. DUBIN: And I don't know if it was for the same reason, Your Honor. But this juror has posted to social media about the case. I'm going to read the post into the record and then print it at the break for Your Honor. And we have confirmed that it is him. We have a photo of him from his public social media account.

He posted about the case in 2019. Quote, I am sad for his parents. If it were my son, I would want to participate in terminating his life. Let's end his deep mental distress once and for all. About – he wrote that

about Sigfredo Garcia.

> And then when the prosecution was announced in this case, he posted, surprise, surprise, about Mr. Adelson. All over his social media he's posting about the case. It's his picture. Looks exactly like him. It's from his public Facebook account, I believe. I can print the court exhibit. It's not my intent to further embarrass a prospective juror.

(R-2360-2364). To be clear, there was a prospective juror who represented that he did not have an opinion about Appellant Adelson's guilt and could be fair and impartial, and yet that juror had actually posted on social media about Appellant Adelson – including the idea that if he were the parent of Dan Markel, he would want to kill co-conspirator Sigfredo Garcia. The prospective juror also denied even making the post.

In another instance, a prospective juror claimed not to have an opinion about the Appellant Adelson's guilt, but another juror reported that he had said, "he's guilty" in the juror assembly room within earshot of other jurors. (R-2525; 2535-2539). Accordingly, if "[a]dverse pretrial publicity can create such a presumption of prejudice in a community that the jurors' claims that they can be impartial should not be believed," and there were two instances where

the trial court *actually discovered* that prospective jurors' claims of impartiality should not be believed, then it follows that the presumption of prejudice against Appellant Adelson in Tallahassee, Florida should attach.

Here, of the twelve jurors who actually sat in judgment of Appellant Adelson, eight had media exposure to the case in some manner. (R-2234; 2323-2326; 2467-2471; 2497-2499; 2514-2515; 2528-2529; 2575-2579; 2596-2598). Considering the undisputed, extreme nature of the news and media coverage in this case, and the smaller population in Tallahassee, Florida, the motion for change of venue in this case was amply supported by evidence which established that the community was so pervasively exposed to the circumstances of this incident that Appellant Adelson could not secure a fair and impartial trial in Tallahassee, Florida. In *Manning*, the Florida Supreme Court wrote in summation: "Although the evidence against the defendant in the present case is quite strong, it is possible that another jury uninfluenced by the passion existing in Columbia County at the time of this trial might have reached a

different verdict." 378 So. 2d at 278. The same can be said of Appellant Adelson's case. It is possible that another jury, uninfluenced by the passion existing in Tallahassee at the time of Appellant's trial, might have reached a different verdict.

As such, the motion for change of venue should have been granted to guarantee that Appellant Adelson received the fair trial by an impartial jury to which he is constitutionally entitled. The trial court was aware of the problem of the pretrial publicity, even taking the precaution of granting a protective order so that the media could not access or publish additional evidence that would have been prejudicial to Appellant Adelson leading up to the trial. But the caselaw makes clear that "*every reasonable precaution* should be taken to preserve a defendant's trial by such a jury and to this end if there is reasonable basis shown for a change of venue a motion therefor properly made *should be granted*." *Singer*, 109 So. 2d at 14 (emphasis added). The defense made the showing of, and the record confirms, a reasonable basis for the change of venue.

While it may have inconvenienced the State to move Appellant

Adelson's trial to another venue, this Court should, in its "independent evaluation of the circumstances" *Sheppard*, 384 U.S. at 362, follow the Florida Supreme Court's analysis in *Singer* that judiciously weighs the importance of a defendant's fair trial against any inconvenience caused. *See Singer*, 109 So. 2d at 14 ("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."). The *Singer* court also appropriately pointed out that it "can see no way in which it can cause any real damage" to the State for the court to grant the motion for change of venue. *Id.* A change of venue, the Florida Supreme Court said in *Singer*, even in a "questionable case," would be "certain to eliminate a possible error and to eliminate a costly retrial if it be determined that the venue should have been changed." *Id.*

Appellant Adelson asserts that his case was not a questionable case, and plainly warranted the change of venue to protect his constitutional rights to a trial by an impartial jury under article I, section 16 of the Florida Constitution and the Sixth Amendment to the

United States Constitution. Even if it could be argued that a change of venue was not warranted when jury selection began, as jury selection unfolded, it became apparent that the prejudice against Appellant Adelson in Tallahassee threatened Appellant Adelson's constitutional right to a fair trial by an impartial jury. Counsel appropriately moved for a change of venue in light of these insurmountable obstacles to fairness, i.e., the pervasive exposure to pretrial publicity that painted Appellant Adelson in such a bad light that 53 out of 54 jurors who had formed an opinion about the case believed Appellant Adelson to be guilty, as well as evidence of at least two jurors who affirmatively lied to the court about their negative opinions of Appellant Adelson. Simply put, if this case does not meet the standard for a change of venue, it is hard to imagine a case that would.

**2. The trial court abused its discretion when it denied Appellant Adelson's motion to strike the venire panel after several potential jurors reported to the court and the parties that other potential jurors were having conversations together – about the case – after being instructed not to do so.**

**a. Standard of Review.**

A trial court's ruling denying a motion to strike the jury panel is reviewed on appeal pursuant to the abuse of discretion standard of review. *See Morris v. State*, 219 So. 3d 33, 41 (Fla. 2017).

**b. Argument.**

During the individual voir dire process, prospective jurors reported several instances of other prospective jurors discussing the case (which was against the instruction of the trial court):

> PROSPECTIVE JUROR: The only thing this person said is that they thought it was the FSU case. It had something to do with the murder of the professor. And, I mean, that was really it. She didn't go into detail. I said, I think they had kids, I think it was a divorce.
>
> MR. DUBIN [defense counsel]: Right. Did anybody else mention anything about the case that you heard of?
>
> PROSPECTIVE JUROR: No. The guy behind me cursed a little bit because he said, Well, we're screwed because we're going to be here all day. But, I mean –
>
> MR. DUBIN: What curse word did he use?

PROSPECTIVE JUROR: Well, he used the eff word, if I'm being honest.

MR. DUBIN: Did anybody express any opinions about Mr. –

PROSPECTIVE JUROR: The guy behind me did.

MR. DUBIN: Okay.

PROSPECTIVE JUROR: He said, *He's guilty*.

. . . .

MR. DUBIN: So the young man said it. You were all, crowded in the jury assembly room. So fair to say, it was within earshot of others?

PROSPECTIVE JUROR: Oh, yeah.

(R-2535-2537) (emphasis added). As a result, defense counsel moved to strike the panel:

MR. DUBIN: Okay. Given what we've learned from [JUROR NAME], I could tell you, Your Honor, that it's extremely disconcerting to hearing that a prospective juror that just came in, apparently, has a strong opinion. That's one thing, that he came in and was apparently not honest with the Court. What's more concerning is that he blurted it out loud in the assembly room.

And in an abundance of caution and to protect my client's constitutional right, I'm going to move to strike the entire panel. We have no idea, without conducting an investigation, of who this young man said this within

> earshot. You know, she didn't follow him around. He, apparently, wasn't sitting behind her the whole time.
>
> But this is not the first person we've heard say that they were reading about or discussing the case in the assembly room. And, unfortunately, without getting to the bottom of it, I think, in an abundance of caution, we need to strike the panel.

(R-2539-2542).

Notably, the *very next* potential juror to be questioned confirmed that she – and others – had been discussing the case "All day, I think, we were just talking about it" (R-2542), despite the trial court having "instructed everyone do not discuss the case in any way, that was fairly direct and specific for a reason." (R-2541-2542). Importantly, that juror held a pre-conceived notion of Appellant Adelson's guilt. (R-2542-2543). Thus, defense counsel renewed the motion to strike the panel:

> MR. DUBIN: I'm going to renew my motion, Your Honor, to strike this entire panel. I think it's abundantly clear at this point that they're out there – this is now the third person – or at least the second who has said they're all out there discussing the case.
>
> THE COURT: Well, she is an imprecise speaker. But I am going to get this cleared up right now. Go ahead.
>
> MR. DUBIN: Yeah. Just to complete the record. And

I don't mean to belabor the point, Your Honor.

THE COURT: State?

MR. DUBIN: Just real quick.

THE COURT: Go ahead.

MR. DUBIN: Last thing I'll say is that she was not credible, in my estimation, at all when she denied what it was about. She went from saying, We've been talking about it all day and then she said, Oh, just nine years ago. I don't think she was being candid with the Court.

THE COURT: State?

MS. CAPPLEMAN [the prosecutor]: All I heard is that the jurors discussed the fact that this was the case they were here for jury selection on and that it occurred nine years ago. That doesn't indicate we should strike the panel.

THE COURT: I am going to deny the motion to strike the panel. However, I'm going to go out there and reiterate to them not to discuss any matters pertaining to this case. If you-all wish to come, it's up to you.

(The following proceedings took place in open court, in the presence of the venire.)

THE COURT: [JUROR NAME] you are excused. Have a good day.

Everyone that is here remaining, I understand there was some conversation in the jury assembly areas as to whether or not you would be brought for jury selection as

to this case. When everyone previously heard me say there is to be no discussion concerning the subject matter of this case, is anyone confused in any way as to what I'm saying? Raise your hand now because I want to get this cleared up.

(No audible response.)

THE COURT: Until you are excused from jury selection, do not discuss, in any manner, the subject matter of this case. Is anyone confused? Is anyone not clear? Raise your hands because I want to get this cleared up. You can talk about anything else, but not about this case. We will resume with the individual voir dire.

[JUROR NAME], please come back.

(The following proceedings had outside the presence of the venire in the jury deliberation room:)

THE COURT: [JUROR NAME], were you discussing with Ms. [JUROR NAME] or anyone else the subject matter of this case since you've come to this courtroom?

PROSPECTIVE JUROR: I did not mean to if I was. I think I mentioned I listened to a podcast.

THE COURT: Since coming to this courtroom you talked about that with her?

PROSPECTIVE JUROR: I don't know if it was –

THE COURT: Or was it downstairs earlier?

PROSPECTIVE JUROR: I think it was downstairs.

THE COURT: Okay. Did you have any conversations with anyone else since you've been up in this courtroom

about this case or the subject matter?

PROSPECTIVE JUROR: No. And I thought I heard some people talking about it and I just thought, like, that shouldn't happen.

THE COURT: In 3G? Up here?

PROSPECTIVE JUROR: Correct.

(R-2549-2551). The defense proceeded to strike the juror for cause and the trial court said:

THE COURT: All right. Based on the totality of her responses, including the fact that there's been conversation in violation of the prior directive from the Court about the case itself while they've been waiting to be interviewed, I am going to remove her for cause.

From here, it's probably going to become prudent to ask each juror if they've engaged in any conversations while waiting.

(R-2559).

Very soon thereafter, *another* potential juror disclosed that she had overheard conversations from potential jurors about the case:

PROSPECTIVE JUROR: I did hear – I think I heard one person's opinion that actually voiced, like, what they thought the case was but–

MR. DUBIN: What was that opinion?

PROSPECTIVE JUROR: Like, I think, the phrase was,

I think he did it.

MR. DUBIN: Okay. Thank you very much for your candor. And do you recall, was that person sitting behind you, in front of you, beside you?

PROSPECTIVE JUROR: That was in a previous room other than this one.

MR. DUBIN: Do you recall what the person looked like?

THE COURT: Male or female?

PROSPECTIVE JUROR: Female, maybe 50s or 60. If it's who I remember correctly.

(R-2585-2586). Defense counsel, again, moved to strike the jury panel:

MR. RASHBAUM [defense counsel]: So this is the – we're now hearing about a second person offering an opinion. We heard it was a male, a young kid. Now we're hearing it's female in their 50s and 60s. One of the primary constitutional rights is that a jury not discuss the case before the case is over. You're going to tell them that every single time that we take a break in this trial.

And what we see is that within Jurors 51 and 102, that constitutional right has already been violated. They're all tainted. From 51 to 102. We have no idea what they've said out there. But we know, from at least five jurors now, some of which have come in here and said that they believe he is guilty. They know that they are talking to other jurors out there.

Judge, we have to get rid of Jurors 51 and [sic] 102. They're tainted. We're creating a problem before we've even

begun.

(R-2587-2588). The trial court denied the motion, but indicated that it would revisit it if the defense does an independent investigation that yields additional information. (R-2588-2589). Defense counsel reiterated that "the reality is – again, for the record, the reality is we have picked out of these 51 through what we've done right now, we've picked 13 potential jurors out of 51 and 102. And there's an issue with those jurors and we all know it." (R-2589-2590). Defense counsel continued that, "I think it's prudent, Judge, in a capital case where a man's life is on the line, that if jurors – we know that jurors talked about it in the courtroom. And with all due respect, you scared the heck out of them when you went out there. So they're coming in here now and they're shaking. And they're not telling us everything." (R-2590). The trial court again denied the motion (R-2591) and *once again*, the *very next juror*, indicated that he heard someone – *a different someone* – discussing the case among the prospective jurors. (R-2592-2595). Defense counsel renewed the motion yet again, and the trial court denied it. (R-2595).

In light of the trial court's repeated warnings to the potential jurors, there can be no doubt that the jurors were aware that they should not discuss the case prior to deliberations. The fact that discussions did, in fact, take place clearly indicates an impropriety. *See Scott v. State*, 619 So. 2d 508, 509 (Fla. 3rd DCA 1993) (labeling premature deliberations, in the form of jury comments, as improper); *Brooks v. Herndon Ambulance Service*, 510 So. 2d 1220, 1221 (Fla. 5th DCA 1987) (finding premature jury discussions to be improper). Once a *prima facie* case of potential prejudice has been established, the burden is on the State to rebut the presumption of prejudice. *See Amazon v. State*, 487 So. 2d 8, 11 (Fla. 1986).

In the instant case, the trial court should have granted the motion to strike the jury venire panel in light of the *multiple* accounts of potential jurors talking about the case, and in light of the fact that some of the jurors who had been discussing the case were the same ones who held a preconceived belief that Appellant Adelson is guilty. Moreover, some of the comments reported *were expressions of Appellant Adelson's guilt*. Therefore, the trial court's refusal to strike

the jury venire was unreasonable based on the record in this case.

When faced with the problem of the jurors violating the trial court's instructions not to discuss the case, the trial court removed for cause those particular jurors who admitted to talking about the case, and the trial court went back into the courtroom to instruct the jurors anew (or as defense counsel artfully phrased it, "scare[] the heck out of them") not to have any discussion about the case, evidencing the trial court's belief in the allegations of improper juror discussions. But, while removing some of the jurors who participated in the prohibited discussions was proper, *it did not cure the problem*. It is unknown how many jurors were exposed to the extrinsic and prohibited conversations, particularly since that question was not asked of every potential juror. It is also unknown whether every prohibited conversation was reported, as several potential jurors reported distinct comments or attributes of the declarants that other potential jurors did not. Defense counsel made this argument and the trial court acknowledged this concern, remarking that, "From here, it's probably going to become prudent to ask each juror if they've engaged

in any conversations while waiting." (R-2559). Nonetheless, the trial court did not strike the panel.

Accordingly, the trial court abused its discretion because it was unreasonable not to strike the panel under the specific circumstances of this case. Protection of Appellant Adelson's constitutional right to a fair and impartial jury[5] required the granting of the defense's motion to strike jurors 51 through 102 – especially in light of the fact that only 13 of them had not already been excused. The trial court's action of keeping the panel in the face of mounting evidence that the jury panel had been tainted was error – and as a result, Appellant Adelson was denied his constitutional right to a fair trial. *See* U.S. Const. amends. V & XIV; art. I, § 9, Fla. Const.

[5] *See* U.S. Const. amends. VI & XIV; art. I, § 16(a), Fla. Const. *See also Morgan v. Illinois*, 504 U.S. 719, 726-727 (1992); *Turner v. Louisiana*, 379 U.S. 466, 471-472 (1965).

**3. The trial court erred by precluding the defense from entering text messages that would have shown that Appellant Adelson and other alleged co-conspirators were communicating "normally" during the time leading up to Dan Markel's murder – to rebut the State's contention that Appellant Adelson and the alleged co-conspirators were making phone calls about the murder during the time in question**.

**a. Standard of Review.**

"[R]elevant evidence is that which tends to prove or disprove a material fact." *Grau v. Branham*, 761 So. 2d 375, 378 (Fla. 4th DCA 2000) (citing § 90.401, Fla. Stat.). "All relevant evidence is admissible unless its probative value is substantially outweighed by the danger of unfair prejudice, or unless otherwise excluded by law." *Id.* (citing §§ 90.402, 90.403, Fla. Stat.). "As a general rule, a trial court's ruling on the admissibility of evidence will not be reversed, absent an abuse of discretion." *McCray v. State*, 919 So. 2d 647, 649 (Fla. 1st DCA 2006). "However, a trial court's discretion over such decisions is limited by the evidence code and the applicable case law, and its interpretation of those authorities is subject to *de novo* review." *Hendricks v. State*, 34 So. 3d 819, 822 (Fla. 1st DCA 2010). *See also Twilegar v. State*, 42 So. 3d 177, 194 (Fla. 2010) ("As a general rule,

a trial court's ruling concerning the admissibility of evidence will be sustained on review absent an abuse of discretion. . . . Yet a court's discretion is not boundless, and it may be constrained by legal precepts such as the rules of evidence, . . . and the principle of *stare decisis*.") (citations omitted); *Johnson v. State*, 969 So. 2d 938, 949 (Fla. 2007) ("This Court reviews evidentiary rulings for abuse of discretion. A judge's discretion is limited by the rules of evidence, . . . and by the principles of *stare decisis*. A trial court ruling constitutes an abuse of discretion if it is based 'on an erroneous view of the law or on a clearly erroneous assessment of the evidence.'") (citations omitted).

**b. Argument.**

The trial court erred when it precluded the defense from entering text messages into evidence that would have shown that Appellant Adelson and alleged co-conspirators (Katie Magbanua, Donna Adelson, and Wendi Adelson) were communicating "normally" during and around the time of the murder. The trial court's stated reasons for excluding the communications were hearsay, relevance, and

confusion of the issues. (T-1589). During its case, the State was permitted to introduce call logs and cell-site tower information (CSLI), which showed that Appellant Adelson and Ms. Magbanua were communicating directly before the murder, around the time of the murder, and after the murder took place – allowing the State to argue that the jury should infer that the communications pertained to the murder. (T-894, 2070-2074). In response, during the defense's case in chief, the defense sought to introduce text messages to rebut that inference: the proffered text messages showed that communications taking place during this time period were about wholly unrelated matters. The defense further argued that the text messages, as a collection or composite, showed that Appellant Adelson's state of mind was *not* someone conspiring to commit a murder. (T-1589). Nevertheless, the trial court excluded the text messages. (T-1589).[6] Thereafter, defense counsel argued:

> MR. RASHBAUM [defense counsel]: . . . In the State's case-in-chief, they were allowed to put in phone calls showing the arrows (indicating) that they have no idea

[6] The defense proffered the text messages for appellate review. (R-2015-2065: Court Exhibit 1/Defense Exhibit 43).

anything said on those calls. They're essentially the same thing as putting in text messages like this except you actually see the content, right?

THE COURT: The chain of the traffic versus what is actually said?

MR. RASHBAUM: They put in every call. Okay. They put in every call between these participants on that – on those particular dates which, by the way, correspond mostly to the days that I'm offering these text messages for. They put them in for their own purposes.

I think I should be allowed, under a 403 analysis– what's good for the goose is good for the gander– to put in the text messages to show the pattern or a lack of a pattern of anything. And that's what these text messages show.

But I can just ask the questions, but I would like the record to reflect that, under a 403 analysis, it was allowed for them. It's not being allowed for us.

THE COURT: I wouldn't exactly say it boils down to being that simple, but your objection is noted. Specifically as to what the State was permitted to demonstrate in their case-in-chief goes to either demonstrating motive or direct evidence of what they believe show the elements of the charges.

As to these composite exhibits– and again, I don't want to get very deep into what the subject matter is – there are messages that either go to embarrassing of the other witnesses or litigants in this matter, matters that are wholly irrelevant or matters that do not demonstrate in any way the theory of defense as the Court understands it.

If there are portions, again, that are specifically relevant to negating either the motive or any of the elements of the charges and are not hearsay, as argued by

> the Defense, I will consider those separately. But as a composite on the whole, the 403 issues, the relevance and hearsay issues I believe compel me to deny their admission.

(T-1591-1593). Ultimately, defense counsel was permitted to *ask* Appellant Adelson about the text messages:

> Q (BY MR. RASHBAUM): You've had an opportunity to review your text messages from June 2nd to June 7th, 2014?
>
> A (BY CHARLES ADELSON): Yes, I have.
>
> Q: Anything in those text messages out of the ordinary?
>
> A: No.
>
> Q: They're text messages about what types of subjects?
>
> A: Work, personal life.
>
> Q: Anything about a first attempted murder in Tallahassee?
>
> A: No, not at all.
>
> Q: Anything about any sort of violence?
>
> A: No, not at all.
>
> Q: Any – anything about any sort of panic?

A: No, not at all.

(T-1594).

The Sixth Amendment to the United States Constitution, as interpreted by the United States Supreme Court, guarantees a criminal defendant the right to present a defense. *See Chambers v. Mississippi*, 410 U.S. 284, 302 (1973). *See also* art. I, § 9, Fla. Const. "[A]t a minimum, . . . criminal defendants have the right . . . to put before a jury evidence that might influence the determination of guilt." *Taylor v. Illinois*, 484 U.S. 400, 408 (1988) (internal quotation marks omitted). A criminal defendant's right to present a defense is essential to a fair trial. *See United States v. Valenzuela-Bernal*, 458 U.S. 858, 875 (1982) (O'Connor, J., concurring).

"Florida law is clear that 'where evidence tends in any way, even indirectly, to establish a reasonable doubt of defendant's guilt, it is error to deny its admission.'" *Mateo v. State*, 932 So. 2d 376, 379 (Fla. 2d DCA 2006) (citation omitted). "Thus, as a general proposition, any evidence that tends to support the defendant's theory of defense is admissible, and it is error to exclude it." *Id.* (citations omitted).

In this case, the excluded text messages tended to establish a reasonable doubt as to Appellant Adelson's guilt. The State was permitted to show the jury that phone calls occurred between the alleged co-conspirators, and to argue that the fact that the alleged co-conspirators were communicating on certain dates showed that they were conspiring about, or at least discussing, the murder. The defense wanted to show the *actual substance of the text messages* to the jury to negate the State's assertion that these alleged co-conspirators were discussing the murder, and that the substance of the messages was in fact *not about the murder*, but were about "normal" things. Thus, it was error to exclude the messages.

The error in excluding the messages was *not* harmless – as the State *cannot* meet its burden of proving beyond a reasonable doubt that the error did not contribute to the verdict. *See State v. DiGuilio*, 491 So. 2d 1129, 1138 (Fla. 1986) ("The harmless error test . . . places the burden on the state, as the beneficiary of the error, to prove beyond a reasonable doubt that the error complained of did not contribute to the verdict or, alternatively stated, that there is no reasonable possibility that the error contributed to the conviction.")

(citation omitted). In applying the harmless error test, this Court should examine "the entire record" including "a close examination of the permissible evidence on which the jury could have legitimately relied." *Id.* It cannot be said that the fact that the jury was *permitted to see phone calls* between the alleged co-conspirators, and *not permitted to see* that the substance of their communications (text messages) actually pertained to *unrelated matters*, and also gave no indication that they were conspiring to commit, and/or were actually committing, a murder, did not contribute to the conviction of Appellant Adelson. Preventing the jury from seeing that, in fact, Appellant Adelson communicated "normally" with Magbanua, Donna Adelson, and Wendi Adelson during the relevant time period – and that his state of mind was *not* planning, conspiring, or discussing the murder of Dan Markel – was extremely prejudicial to the defense. The trial court erred by ruling that (1) the State *was permitted* to use the chain-of-traffic phone calls because their evidence "goes to either demonstrating motive or direct evidence of . . . elements of the charges," but (2) the defense *was not permitted* to introduce the actual substance of communications between the alleged co-conspirators

and to show Appellant Adelson's state of mind. As explained above, this evidence tended to show a reasonable doubt as to Appellant Adelson's guilt and therefore should have been admitted.

Accordingly, for the reasons set forth above, the trial court erred by preventing the defense from introducing the text messages between Appellant Adelson and the alleged co-conspirators. The improper exclusion of the text messages resulted in a violation of Appellant Adelson's constitutional right to a fair trial. *See* U.S. Const. amend. V & XIV; art. I, § 9, Fla. Const. Appellant Adelson is therefore entitled to a new trial.

**4. The trial court improperly excluded relevant, excepted-hearsay evidence that was highly probative to the theory of defense – i.e., a recorded phone call where Appellant Adelson made the statement that he had been extorted in the past and this is not how extortion works**.

**a. Standard of Review.**

The standard of review set forth in claim 3 also applies to this claim.

**b. Argument.**

When a defendant seeks to introduce his own out-of-court statement for the truth of the matter asserted, it is inadmissible hearsay. *See Cotton v. State*, 763 So. 2d 437, 439 (Fla. 4th DCA 2000). However, if a defendant's out of court statement is not offered by the defendant to prove the truth of its content, it is not hearsay and should be admitted – provided the purpose for which the statement is being offered is relevant to a material issue in the case. *See id.* "Even though a particular statement might not be admissible to demonstrate its truth or falsity, this does not compel a conclusion that the same statement is not admissible to show the declarant's state of mind." *Lark v. State*, 617 So. 2d 782, 788 (Fla. 1st DCA 1993).

Appellant Adelson testified during the defense's case in chief. During Appellant Adelson's testimony, he explained what he was doing during the time surrounding "the bump." Relevantly, he said that he told his father, Dr. Harvey Adelson, that he believed that the alleged extortionists from April 2016 ("the bump") were actually the police. (T-1768-1770). The next day, Appellant Adelson discussed the matter on a phone call with his mother, Donna Adelson, which the FBI recorded. (T-1770). The defense attempted to move the phone call into evidence as Defense Exhibit 100, but the State objected on hearsay grounds. (T-1770). The defense then proffered the recorded phone call.

On the phone call, Appellant Adelson asked Donna Adelson whether Harvey Adelson told her what they spoke about. (T-1779). On the recorded call, Appellant Adelson told Donna Adelson that "it's not done like that. It's not . . . I know for a fact it's not. It's not done like that at all." (T-1780).

After hearing the proffer, the trial court asked defense counsel the following question:

With regard to the hearsay objection, the part that really

> struck my ear was your client saying "it's not done in this way." What is his qualification to essentially make this opinion if this is not hearsay?"

(T-1783). Defense counsel responded that Appellant Adelson had been extorted before (by Dan Markel's killers), and he knows it is not done this way (i.e., the way that the FBI was doing it via "the bump"). (T-1783). The trial court responded:

> Assuming there are many ways to skin a cat beyond the one way in which he's alleging to have been extorted, what is his foundation to make this opinion?

(T-1783-1784). Defense counsel explained that the opinion is based on Appellant Adelson's past extortion experience (i.e., the theory of defense) and that the statement would have been an exception to the hearsay rule because it was being offered to establish Appellant Adelson's state of mind at the time of the call. (T-1784). Despite this explanation, the trial court sustained the hearsay objection and did not allow the admission of the phone call into evidence. For the reasons set forth below, the trial court's ruling was erroneous.

As an initial matter, the trial court's inquiry into Appellant Adelson's "basis of opinion" was not the appropriate consideration, and the fact that the trial court so inquired illustrates that the trial

court misconstrued the question to be decided. The basis of the State's objection was hearsay. The Florida Evidence Code defines hearsay as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." § 90.801(1)(b), Fla. Stat. If the statement is offered for some purpose other than its truth, it is not hearsay. *See Penalver v. State*, 926 So. 2d 1118, 1132 (Fla. 2006) ("[I]f the statement is offered for some purpose other than its truth, the statement is not hearsay and is generally admissible if relevant to a material issue in the case.").

The statement of Appellant Adelson that "this is not how [extortion] is done" was *not* being offered to prove the truth of the matter asserted – that is, that extortion is not done in the particular way that the FBI was doing it. Rather, the statement was to be used to show that Appellant Adelson believed that the police were behind "the bump" extortion, because he had been previously extorted by Dan Markel's killers. As such, having been a prior victim of extortion (which was the defense's theory, and this statement – made in April 2016 – would have corroborated the defense theory) was Appellant

Adelson's state of mind.

The trial court's inquiry of defense counsel was erroneous because the trial court's inquiry focused on the truth of the matter asserted – i.e., that Appellant Adelson needed to have a sufficient basis of knowledge regarding extortion in order for the statement to come into evidence. But the opposite is true. If Appellant Adelson was offering the statement for the truth of the matter that extortion is done in a particular way, established by some basis of knowledge of Appellant Adelson's, then the statement *would be hearsay*. Instead, the statement was offered to demonstrate Appellant Adelson's state of mind, which was that he believed the police were behind "the bump" because he had previously been extorted and it was not done in this way. Since Appellant Adelson was offering the statement for his state of mind, it was an exception to the hearsay rule. *See Everett v. State*, 801 So. 2d 189, 191 (Fla. 4th DCA 2001) ("An out of court statement offered for the truth of the matter asserted is generally inadmissible hearsay. . . . However, the same statement may be admissible to prove a variety of issues besides the truth of the matter, such as the declarant's state of mind.")

Therefore, the trial court erred as a matter of law in concluding that the out-of-court statement of Appellant Adelson regarding "this is not how extortion is done" was hearsay – because the testimony was *not* "offered in evidence to prove the truth of the matter asserted."

Given that the statement was not hearsay, it should have been admitted, provided that the purpose for which the statement was being offered was relevant to a material issue in the case. *See Cotton*, 763 So. 2d at 439. Although the trial court did not reach this step because it found that the statement was hearsay, Appellant Adelson asserts that the purpose for which the statement was offered was relevant to a material issue at trial. In this case, Appellant Adelson's defense was that after the murder of Dan Markel, he was contacted by the killers through someone he knew, and he was told that he needed to pay money (he called this "extortion") or else he would be killed, and that he did in fact pay the extortion money to avoid being killed (i.e., the first extortion). Exclusion of the phone call in which Appellant Adelson said in 2016 – seven years before Appellant Adelson's case went to trial and six years before his arrest – that "it's not done like that" in reference to the previous extortion by the killers

of Dan Markel, was directly relevant to the material issue of whether he was extorted by the killers after they killed Dan Markel, and exclusion of the statement was extremely prejudicial, since it was a statement made in 2016 – before anybody was arrested in this case – that would have corroborated the theory of defense.

The error in this case was *not* harmless – the State *cannot* meet its burden in this case of proving beyond a reasonable doubt that the error did not contribute to the verdict. *See State v. DiGuilio*, 491 So. 2d 1129, 1138 (Fla. 1986). Stated another way, the State cannot prove beyond a reasonable doubt that the result of the trial would not have been different if the jury heard Appellant Adelson's statement that he was extorted before the 2016 "bump" – many years before his arrest. In other words, the defense that Appellant Adelson was extorted by Dan Markel's killers would have been corroborated by the statement, which was made on a recorded line long before Appellant Adelson's arrest. Instead, the jury was left with Appellant Adelson's mere testimony that he was extorted by the killers, without the affirming evidence from six years before his arrest. As such, the

excluded statement was highly relevant and crucial to his defense.

Accordingly, for the reasons set forth above, the trial court erred by excluding Appellant Adelson's statement from 2016 recorded phone call. The improper exclusion of the call resulted in a violation of Appellant Adelson's constitutional right to a fair trial. *See* U.S. Const. amend. V & XIV; art. I, § 9, Fla. Const. Appellant Adelson is therefore entitled to a new trial.

**5. Cumulative error.**

**a. Standard of Review.**

Appellant Adelson submits that this claim presents a pure question of law that is subject to the *de novo* standard of review. *See Williams v. State*, 946 So. 2d 1163, 1164 (Fla. 1st DCA 2006) ("We have *de novo* review over a pure question of law.") (citation omitted).

**b. Argument.**

Appellant Adelson asserts that in light of the errors set forth above, he was denied his constitutional right to a fair trial. *See* U.S. Const. amends. V & XIV; art. I, § 9, Fla. Const. In support of his argument, Appellant Adelson relies on *Broomfield v. State*, 114 So. 3d 1008, 1009 (Fla. 5th DCA 2012), wherein the Fifth District Court of Appeal stated:

> Appellant, Raymond Broomfield, Jr., challenges the judgment and sentence entered after he was found guilty by a jury of trafficking in cannabis and cultivation of cannabis. Broomfield contends that the State's improper questioning of investigating deputies and improper arguments during closing argument constitute fundamental error. We agree and reverse and remand for a new trial.
>
> While the prosecutor's questions and comments, standing alone, may not rise to the level of fundamental

> error, the cumulative effect of the prosecutor's errors denied Broomfield a fair and impartial trial. *See Slagle v. State*, 58 So. 3d 427 (Fla. 1st DCA 2011) (cumulative effect of the prosecutor's errors denied Slagle a fair trial); *Freeman v. State*, 717 So. 2d 105 (Fla. 5th DCA 1998) (finding that the cumulative effect of prosecutor's errors, which included improper bolstering of police witnesses, impermissible burden shifting, and improper references to facts not in evidence, required a new trial).
>
> We decline to address the other issues raised by Broomfield.
>
> REVERSED and REMANDED for new trial.

As in *Broomfield*, in the instant case, the cumulative effect of the errors in this case denied Appellant Adelson a fair and impartial trial.

## F. CONCLUSION

The appropriate remedy for all claims is a reversal of Appellant Adelson's convictions and a remand with directions that the trial court conduct a new trial.

## G. CERTIFICATE OF SERVICE

I HEREBY CERTIFY a true and correct copy of the foregoing instrument has been furnished to:

Office of the Attorney General
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Email: crimappTLH@myfloridalegal.com

by email delivery this 7th day of May, 2025.

Respectfully submitted,

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## H. CERTIFICATE OF COMPLIANCE

Undersigned counsel hereby certify pursuant to Florida Rule of Appellate Procedure 9.045(b) that the Amended Initial Brief of Appellant complies with the type size and typeface requirement because this document has been prepared in a proportionally spaced typeface using WordPerfect X9 in Bookman Old Style 14-point font size. Undersigned counsel also certify pursuant to Florida Rule of Appellate Procedure 9.210(a)(2) that the Initial Brief of Appellant contains 15,170 words (and therefore undersigned counsel are filing an unopposed motion to exceed the word limit).

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