IN THE SUPREME COURT OF FLORIDA

CASE NO. 64,721

LUIS CARLOS ARANGO, a/k/a
CARLOS LUIS ARANGO,

Appellant,

vs.

THE STATE OF FLORIDA,

Appellee.

FILED
SID J. WHITE
JUL 13 1984
CLERK, SUPREME COURT
By
Chief Deputy Clerk

* * *

INITIAL BRIEF OF APPELLANT

* * *

APPEAL AFTER REMAND FOR
BRADY HEARING IN THE
ELEVENTH JUDICIAL CIRCUIT
IN AND FOR DADE COUNTY, FLORIDA,
CRIMINAL DIVISION
CASE NO. 80-5372

* * *

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STATEMENT OF THE ISSUE PRESENTED FOR REVIEW

WHEN THE STATE CONCEALED THE THIRD GUN IT DEPRIVED MR. ARANGO OF CRUCIAL EXCULPATORY EVIDENCE AND HIS RIGHT TO A FAIR TRIAL.

A. POLICE CONCEALMENT OF FAVORABLE EVIDENCE REQUIRES A NEW TRIAL EVEN ABSENT PARTICIPATION BY THE STATE ATTORNEY.

B. THE BRADY TEST AND AGURS STANDARDS OF MATERIALITY TO BE APPLIED.

C. THE COURT BELOW ERRED IN FINDING THAT THE DEMAND FOR PRODUCTION OF FAVORABLE EVIDENCE WAS GENERAL AND NOT SPECIFIC.

D. THE PROSECUTION PRESENTED AN INCOMPLETE AND THUS INACCURATE CHAIN OF CIRCUMSTANTIAL EVIDENCE THEREBY PREVENTING A FAIR TRIAL UNDER ANY MATERIALITY TEST.

INTRODUCTION

In Arango v. State, Case Nos. 63,562; 63,653; 437 So.2d 1099 (Fla. 1983), this court remanded the cause for hearing on the asserted Brady violation.

The full record-on-appeal to be considered here by Order of this Court (R. 559), includes:

1. The former Records in Supreme Court Case Nos. 63,562; 63,563; and 59,678 which consist of pages 1-1319; supplemented by
2. Two volumes of additional pleadings, transcripts, and exhibits introduced at the Brady hearing which occurred on November 29, 1983, numbered by pages 1-560; and
3. One supplemental volume containing only the transcript of the hearing occurring on November 29, 1983, pages 1-102.

For purposes of this appeal reference to the former Record will be cited as "F.R." followed by the appropriate page number. References to the record prepared specifically for this appeal, Case No. 64,721, will be cited as "R." followed by the appropriate page number. References to the Supplemental Record prepared specifically for this appeal, No. 64,721, will be cited as "Supp.R." followed by the appropriate page number.

Throughout this brief the Appellant, Luis Carlos Arango, will be referred to by name, and his trial attorney will be referred to as

"defense counsel."

Since the police are part of the prosecution team, throughout this brief when reference is made to "the prosecution" or the "state", the actions or omissions of the police are included. The term the "prosecution" is thus distinguished from references specifically to the "state's attorney" or the individual "prosecutor" as used herein.

STATEMENT OF THE CASE

Luis Carlos Arango rejected the state's plea offer of life imprisonment, and rather, pled not guilty to the two count indictment charging first-degree murder and possession of a controlled substance (F.R. 348-9).

A jury found him guilty on both counts on July 17, 1980 and recommended the imposition of the death penalty as to the charge of the murder of Jairo Posada (F.R. 139-140).

The trial judge found that one mitigating circumstance applied, that is, Mr. Arango had no prior record of crime activity. See §921.141(6)(a), Fla. Stat. (F.R. 149-150).

Mr. Arango was sentenced to death by electrocution, however, based upon the single aggravating circumstance found by the trial judge to apply, that is, that the offense was committed in an especially heinous, atrocious, and cruel manner. See §921.141(5)(h), Fla. Stat. (F.R. 149), cert. denied, 457 U.S. 1140 (1983).

This court affirmed that conviction and sentence in Arango v. State, 411 So.2d 172 (Fla. 1982) (Justices McDonald and Boyd concurring as to guilt, but dissenting as to the imposition of the death sentence.)

Three years later[1] this Court in Arango v. State, 437 So.2d 1099 (Fla. 1983) instructed the trial court to conduct an evidentiary hearing on Mr. Arango's claim that the state improperly with-

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[1]The intervening procedural history of this case is not directly relevant to the limited issue presented for review in this brief, however the procedural history is fully set forth in the motion filed below at R. 462-468.

held specifically requested exculpatory evidence in violation of Brady v. Maryland, 373 U.S. 83 (1963).

This court accurately summarized the issue as follows:

> At trial, petitioner testified that he and the victim were overpowered by three assailants who murdered the victim and fled prior to the arrival of the police. Petitioner now urges that he has recently discovered, on approximately April 23, 1983, that a semi-automatic pistol was found on the day following the murder under the balcony of petitioner's apartment, and was turned over to the police investigating the murder. Petitioner urges that the evidence was exculpatory and that the state failed to produce this evidence despite his discovery motion which specifically requested, inter alia:
>
> > 3. Any physical evidence or witness statements which corroborate the Defendant's statements to Detective Diaz that other Latin males entered the apartment and committed the homicide.[2]
>
> The state acknowledges that it did not make petitioner aware of this evidence but maintains that the pistol was unrelated to this case and, thus, was not disclosed. We express no views on the merits but petitioner has made a prima facie case which requires a hearing. We remand to the trial court for the purpose of conducting a hearing on the claimed Brady violation. Our stay of execution granted on May 2, 1983, remains in effect pending the outcome of the hearing.
>
> It is so ordered.

437 So.2d at 1105.

A hearing limited to the Brady violation was then held before

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[2]The demand also requested:

> 1. Any witness accounts or statements or physical evidence indicating that other persons in addition to the Defendant and the decedent were in the Defendant's apartment at the time of the homicide.

See R. 518-519 for complete motion; see also, page 6 infra.

the original trial judge on November 29, 1983.

No live testimony was presented to the court below because there was no dispute as to the facts surrounding the state's failure to disclose the third gun, and no determination as to the credibility of witnesses was necessary to determine the legal issue of whether Brady v. Maryland requires reversal of the conviction or sentence.

Rather, the parties stipulated that the matter could be determined upon a review of the entire record with the addition of the 1983 deposition testimony with certain exhibits, which for the most part were attached to the depositions of the police, prosecutor and defense counsel involved (Supp.R. 5).

The court below denied Mr. Arango's request for a new trial or new sentencing hearing. The trial judge entered a short order denying the Motion for Brady relief and incorporated findings which he had read into the record at the time of the hearing below. (R. 522 and Supp.R. 88-96). The trial judge then appointed undersigned counsel to represent Mr. Arango on appeal (Supp.R., 100-102).

This appeal seeks reversal of the Order denying Brady relief, and requests a new trial or sentencing hearing for Mr. Arango.

STATEMENT OF THE FACTS

Prior to trial Mr. Arango timely and specifically requested in writing the following, *inter alia*:

> 1. Any witness accounts or statements or *physical evidence* indicating that other persons in addition to the Defendant and the decedent were in the Defendant's apartment at the time of the homicide.
>
> 2. Any physical evidence indicating that the Defendant did not fire the murder weapon or that another person did, in fact, fire the murder weapon.
>
> 3. *Any physical evidence* or witness statements *which corroborate* the Defendant's statements to Detective Diaz that other Latin males entered the apartment and committed the homicide.
>
> 4. *Any police investigation report* made to the police which tends to establish the Defendant's innocence or to impeach or contradict the testimony of any witness whom the State will call at the time of the trial of this case.

(F.R. 67-68a; R. 518-519) [Emphasis added].

Notwithstanding that request, the state did not reveal to Arango or his attorney that the police had in its possession all during the trial a semi-automatic pistol and casings that had been found on the day following the murder under the same bedroom balcony from which Arango had said one of the armed murderers had escaped.

The lead investigator, Deborah (Young) Wiley instructed Detective Angel Nieves to interview Mr. Arango at the scene because Arango spoke only Spanish (R. 161). Luis Arango gave a statement of what had happened in Spanish to Detective Angel Nieves. Mr. Arango immediately told the detective that he was innocent. Detective

Nieves testified that Mr. Arango described how "three unknown males forced their way into the apartment and cornered them [Arango & Posada] in the dining room area." (R. 431).

Detective Nieves further testified that Arango gave him a description of the three intruders, and told how after they brutally beat and killed Posada, they escaped before the police came, and one jumped off the bedroom balcony which led to the parking lot:

> DETECTIVE NIEVES: ...He [Arango] said two of the subjects fled out of the kitchen door, <u>and one of them jumped off of the bedroom balcony</u>.
>
> He went on to say -- you have a copy of the report -- that this subject, listed as Number 1, is the <u>one that jumped off the balcony</u>.

(R. 433). [Emphasis added.]

While at the scene and again at the station, lead Investigator Young discussed with Detective Nieves his conversations with Arango (R. 178). Not only the police, but also the prosecutor was aware of Mr. Arango's defense prior to trial. (R. 336).

By the time the interior of the apartment had been processed, it was dark outside and no physical inspection was made of the area outside the apartment under the balcony. (R. 322; 110).

The next day, while Mr. Arango was in custody, a uniformed police officer, Dennis Lake, notified the lead homicide investigator in the Arango case, Deborah Young Wiley, that a loaded semi-automatic pistol and casings had been found directly under the balcony of Mr. Arango's apartment by a boy who lived in the apartment complex. (R. 182-205).

Upon instructions from Detective Young, the officer took the gun

and casings and sent them to the crime lab (R. 186). He cross-referenced the Lab Analysis Request to the murder that took place in Arango's apartment by writing the homicide case number on the request with the special notations as follows:

> Summary of Case: Possibly involved in a homicide at 5525 S.W. 77 Court, Case #97865-A.
>
> Special Analysis requested: Contact Detective D. Young at 630 for further information.

(R. 186-7; 203).

The police firearms examiner, Robert Kennington, testified that he had also made certain additional notations on the police property receipt of this third gun. The firearms expert wrote a note on the property receipt indicating that Roy Kahn was the prosecutor on the homicide case to which this gun was cross-referenced. He testified that it was his usual practice to send the prosecutor a copy of his Lab Report, but he could not remember if he had in fact notified Roy Kahn in this case. (R. 216-218; 235-237).

The property receipt is clearly marked as "trial evidence" and "lab evidence." (R. 251). The firearms expert testified that no accurate lab report was now available on this pistol due to a mistake on his part. His records for the impounded third gun contained a misfiled, unrelated report on a different case.[3] (R. 225-226.)

Lead Investigator Young traced the ownership of the gun (R. 132). It was purchased two days prior to the murder on March 26,

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[3]The details of how counsel finally discovered the existence of the third gun is set forth by the investigator, Tom D'Azevedo (R. 267-311) and further detailed at R. 467-520.

1980, from the Tamiami Gun Shop and registered to a man named Antonio Garcia (R. 403). Detective Young attempted to locate the owner (R. 118), but did not vigorously pursue the search (R. 132-133).

The state never revealed to Mr. Arango or his defense counsel any information about this third gun, despite the general request for discovery and the specific request for physical evidence and police investigation reports corroborating Arango's defense theory as told to the detectives that three armed men committed the murder and one had escaped over that bedroom balcony (R. 351).

Not only did Arango's defense attorney make written requests for the exculpatory evidence, but he also deposed the lead homicide investigator (R. 150-181). In her deposition of June 11, 1980, Detective Young never gave defense counsel any information about the gun despite his repeated careful questioning of "What was your next involvement in this case," (R. 166; 168; 170) and "Have you done anything else concerning any involvement in this case?" (R. 170-171).

Throughout the trial the police had the third gun in its possession (R. 260,261). Mr. Arango was deprived not only of the physical gun for preparation of his defense, but also of all the circumstances surrounding it. The state did not tell him that casings had also been found. The state did not tell him that the gun was purchased only two days before the murder. The state did not tell Arango that they knew the name of the registered owner and place and time of purchase. The state did not tell Arango the

results of ballistics or other tests which were or could have been performed on the gun. Nor did Arango have the opportunity to conduct blood or fingerprint tests or otherwise use this critical physical evidence to develop his defense as told to the detective at the crime scene (R. 312-341; 342-406).

Mr. Arango learned of this withheld evidence three years after his trial and subsequent to his direct appeal, only through the efforts of the private investigator of new counsel. Investigator Tom D'Azevedo testified how he discovered the records of this third gun while investigating another aspect of the case (R. 267-311).

At the proceedings below the lead investigator admitted that at the time of the incident she "was still relatively new in the section" (R. 116). The trial prosecutor testified that he had not worked with the lead investgator in that capacity before and "I believe that was in fact her first homicide as a lead detective, if I recall correctly." (R. 325).

The lead investigator further testified that she did not advise the prosecutor about the third gun because she made an independent decision that the third gun was not relevant to the Arango prosecution. (R. 126; 128; 140-147).

However, Detective Young testified below that her opinion has changed with respect to whether she should have notified the state attorney regarding the third gun (R. 147).

Roy Kahn, Esquire, the original trial prosecutor, testified that neither Detective Young, Mr. Kennington nor anyone else apprised him of the existence of the third gun[4] (R. 317). The prosecutor

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[4]The state attorney's original Arango trial files were lost after

testified:

> ROY KAHN: Had I been aware of a gun being found the day after the homicide, in the vicinity of the homicide, that information would have been made available as per discovery and as per Brady.... [Emphasis added.]

(R. 320).

Mr. Arango's conviction and sentence of death by electrocution rests solely on circumstantial evidence. Luis Arango immediately made a statement that he was innocent and steadfastly maintained his innocence throughout all proceedings. Fingerprints lifted from the murder weapons were not those of Mr. Arango. Nor were his fingerprints found on any other weapon used to injure Mr. Posada. The fingerprints found on the weapons were not identified. There were no eyewitnesses, other than Luis Arango.

However, there was no physical or other evidence presented to the jury which could reasonably support Mr. Arango's defense that three armed men murdered Posada and one escaped over the bedroom balcony. The jury was faced with only inflammatory evidence of a brutally injured Colombian found dead, with a wound to his penis, in Mr. Arango's apartment. Only two guns, one with a silencer, were presented to the jury, despite Arango's testimony that there were three armed men in the apartment. The police found the dead body

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the trial and later reconstructed for purposes of collateral proceedings (R. 328). Therefore no original notes or police reports could be produced in response to the subpoena for the hearing below.Defense counsel, however, testified that he had "open file discovery" and never saw any report or reference to the third gun in the prosecutor's files (R. 352).

of Jairo Posada, a Colombian citizen, in Luis Carlos Arango's apartment in Dade County, Florida. Mr. Arango was the only other person found in the apartment. A bag containing about two pounds of cocaine and currency was also found.

At the hearing below, Mr. Arango requested a new trial or sentencing hearing on the grounds that he had been denied a fair trial because the State had violated Fla. R. Crim. P. 3.220 and violated his Fifth and Fourteenth Amendment rights enunciated in Brady v. Maryland, 373 U.S. 83 (1963) and explained in United States v. Agurs, 927 U.S. 97 (1976).

The trial judge found that "there was no *specific* request for evidence describing this gun made by the Defense." [Emphasis added.] (Supp.R. 93-4). Based upon that finding, the court found that the withheld gun was not *material*. Mr. Arango's request for a new trial or sentencing hearing was denied below on the grounds that Arango did not establish a Brady violation because

> THE COURT: I do find that general requests were made of the State, under the Brady decision, known as the Brady Rule, and that pursuant to that request, the State gave certain articles, gave open-file discovery, but this gun was not given to the Defendant, since the lead detective didn't feel it was involved in this crime.
>
> Now, the question then is: "Was this gun material to this crime?" I find that the gun in question here may or may not have been in the apartment. I do not believe that it -- that had the gun been disclosed, the jury would have been affected, and the outcome of the case would have in any way been affected by that evidence -- additional evidence being presented.
>
> I felt that the case, as presented by the State, was a strong circumstantial case.

Maybe had Mr. Arango not testified, it might have been -- we can sit here and guess all day as to how the outcome might have been, whether the jurors would have disagreed, but the fact is that they did not disagree and they came to a decision.

I find that based upon the totality of the evidence that has been presented here, I have no reasonable doubt that the outcome of this trial would have been in any way affected by the presentation of this additional gun.

Therefore, based upon the matters that have been presented here and the depositions and the law, I will rule that the article was not material -- the gun was not material in this case and it would not have affected the outcome and it would not have affected the Court's opinion that the Defendant was convicted by evidence beyond and to the exclusion of a reasonable doubt.

Therefore, the motion for the Defendant for the Brady -- the amended motion for post-conviction relief in reference to the Brady violation filed by the Defendant in this case is hereby denied.

The Defendant is to be directed forthwith to be returned to Raiford, and the Supreme Court shall be advised accordingly.

MR. RABIN [Prosecutor]: Your Honor, could I ask the Court to address two specific things for the purpose of review?

First of all, with reference to the Court's finding that there is a general request here, these standards that's set forth in the Agurs case is whether or not the evidence creates a reasonable doubt that did not otherwise exist.

I ask the Court to address whether or not this gun, in the Court's opinion, creates a reasonable doubt that did not otherwise exist.

THE COURT: I thought I said that, but if I didn't, I feel that this gun that was found, had it been presented to the jury, would not have created a reasonable doubt that did not otherwise exist by the evidence that has been presented in this case.

MR. RABIN: And secondly, your Honor, with reference to the Court's ultimate sentencing of the

> Defendant, assuming this gun had been admitted both in the trial and/or in the penalty phase in the light most favorable to the Defendant, the Court weighing the jury's recommendation and this additional evidence, would it have affected the Court's ultimate sentence in this case?
>
> THE COURT: The court finds that had the gun been introduced under those circumstances, the Court would not have changed its finding that the Defendant merits the death penalty in this matter.

(Supp.R. 94-96).

This appeal followed.

ARGUMENT

WHEN THE STATE CONCEALED THE
THIRD GUN IT DEPRIVED MR.
ARANGO OF CRUCIAL EXCULPATORY EVIDENCE
AND HIS RIGHT TO A FAIR TRIAL.

Mr. Arango has a right to a new trial because the state deliberately withheld material evidence which, in the hands of skilled counsel, would have proven his innocence or at the minimum, affected the outcome of his sentence.

A defendant has a right under the due process clause of the Fifth and Fourteenth Amendments to be protected against suppression of exculpatory evidence even in the absence of prosecutorial bad faith. United States v. Keogh, 391 F.2d 188, 147 (2d Cir. 1968), and cases cited therein. Moore's Fed. Pract. §16.06[1].

It was the 1963 decision of the Supreme Court in Brady v. Maryland, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963) that enunciated the essential constitutional basis from which this right derives, apart from any rights to disclosure of evidence pursuant to rules of procedure.

In Brady v. Maryland the Court stressed that the purpose of the due process inquiry is to assure a fair trial and not the formulation of deterrents to prosecutorial misconduct. "The principle...is not punishment of society for misdeeds of a prosecutor but avoidance of an unfair trial to the accused." 373 U.S. at 87-88.

A. POLICE CONCEALMENT OF FAVORABLE EVIDENCE REQUIRES A NEW TRIAL EVEN ABSENT PARTICIPATION BY THE STATE ATTORNEY.

This court has recognized, in Antone v. State, 355 So.2d 777, 778 (Fla. 1979), that there is no distinction between prosecutorial offices within the executive branch of Florida's government. Accord, Giglio v. United States, 465 U.S. 150, 92 S.Ct. 763, 31 L.Ed.2d 104 (1972).

"The duty to disclose is that of the state, which ordinarily acts through the prosecuting attorney; but if he too is the victim of police suppression of the material information, the state's failure is not on that account excused." Barbee v. Warden, 331 F.2d 842, 846 (4th Cir. 1964).

Here, even if the police silence about the third gun resulted from negligence rather than guile, "the deception is no less damaging" Barbee v. Warden, 331 F.2d at 846. In State v. Counce, 392 So.2d 1029 (Fla. 4th DCA 1981) the court upheld the dismissal of the charge of attempted arson where the police destroyed a beer bottle found near the scene which smelled like gasoline.

Likewise, in Freeman v. Georgia, 599 F.2d 65 (5th Cir. 1979) a police detective concealed an eyewitness to a double murder for his own personal reasons. The actions of the police officer were imputed to the state and the court reversed the conviction, finding that a Brady violation had occurred.

Here the rookie lead homicide investigator testified that she investigated the third gun and then made her own deliberate decision to withhold that information from the prosecutor and defense counsel

based upon her personal opinion that they had the right suspect. She thought it was not her job to worry about exculpatory evidence. She then testified that in retrospect she should have advised the prosecutor of all of the evidence found at the murder scene and let the attorney make the desision as to its relevance and disclosure (R. 100-148, 146).

The prosecutor testified that he surely would have disclosed the gun to defense counsel if he had known about it (R. 320).

B. THE BRADY TEST AND AGURS STANDARDS OF MATERIALITY TO BE APPLIED.

In 1972 the Supreme Court described the conditions which must be met in order to trigger the Brady rule: (1) there must have been a suppression of evidence by the state after a defense request for production; (2) the evidence must be favorable to the defense; and (3) the evidence must be material to the issues of guilt or punishment. Moore v. Illinois, 408 U.S. 786, 92 S.Ct. 7562, 33 L.Ed.2d 706 (1972).

In United States v. Agurs, 427 U.S. 97, 96 S.Ct. 2352, 49 L.Ed 342 (1976) the court further honed the application of the Brady rule and set out three categories of cases to which Brady arguably applies and enunciated a standard in each category to determine materiality, that is, the degree of prejudice that must be shown for the reversal of a judgment or sentence.

A strict standard of materiality applies to the first category where the undisclosed evidence indicates that the state's case

included false or perjured testimony, and the prosecutor knew or should have known of the perjury.

A conviction obtained by such use of perjury must be set aside if there is "any reasonable likelihood" that the false testimony could have affected the judgment of the jury." United States v. Agurs, 427 U.S. at 103-104. It is the judgment of the jury and not the trial judge that must be considered.

The second category is illustrated by the Brady case itself and is characterized by a pretrial request for specific evidence. In this class of cases the standard for materiality is whether the suppressed evidence "might have affected the outcome of the trial," 427 U.S. at 104.

The third category enunciated in Agurs, typified by the facts in Agurs, arises when a general request ("all Brady materials") or no request at all is made. In these cases the conviction or sentence will be overturned if the omitted evidence" creates a reasonable doubt that did not otherwise exist,"427 U.S. at 106-107.

C. THE COURT BELOW ERRED IN FINDING THAT THE DEMAND FOR PRODUCTION OF FAVORABLE EVIDENCE WAS GENERAL AND NOT SPECIFIC.

One question which Agurs left open is how specific a "specific request" must be to fall within the parameters of the second Agurs category. It is important to determine whether the request was general or specific in order to apply the correct Agurs standard for materiality. The court here erroneously measured the materiality of the withheld evidence against the strictest standard and found that

it did not create a reasonable doubt that did not otherwise exist.

Agurs held that a simple, boilerplate request for "all Brady material" or for "anything exculpatory" does not provide the prosecution with adequate notice of what the defense is seeking. The purpose of a Brady inquiry, however, is to assure that the accused received a fair trial. Therefore the court in United States v. Goldberg, 582 F.2d 483 (9th Cir. 1978) took the position that "we are loathe to attempt application of Agurs general request standard where it is avoidable." Id. at 489.

In that case the court held to be specific a request for "any written or recorded statements...made by the defendants or by any alleged conspirators not charged herein," for "any other statements made by the Government witnesses," and for any "inconsistent statements by government witnesses."

The totality of circumstances surrounding the request and the nature of the nondisclosure must also be considered to determine the materiality and prejudice.

Here the prosecution knew that Arango steadfastly maintained his innocence from the moment of his first police encounter throughout the sentencing phase. The prosecution knew that his only defense was that three other men each armed with pistols entered his apartment, killed Posada, then at least one armed man jumped off the bedroom balcony (R. 433; 178; 336).

When the uniformed police officer discovered that a gun and casing had been found directly under the balcony where a murder had taken place one day earlier, that officer knew to contact the lead

homicide investigator (R. 182-205). Initially the lead homicide investigator knew enough to cross-reference the impounded gun and casing to the file for that murder investigation (R. 186). The initial property receipt even identified the gun as "trial evidence" and "lab evidence" (R. 251). The lab request labels this gun as "possibly involved in a homicide at [Arango's address]."

In light of the totality of information available to the state, defense counsel's request was specific for "any physical evidence indicating that other persons in addition to Defendant and decedent were in the defendant's apartment at the time of the homicide" and "any physical evidence...which corroborated the Defendant's statements to Detective Diaz (sic) that other Latin males entered the apartment and committed the homicide." (R. 518-519).

If the third gun had been found in a garbage can five miles from the scene, it would be a totally different story. But the police firearms expert testified below that the proximity of the gun to the murder scene would have influenced his consideration of the gun.[5]

> ROBERT KENNINGTON: If I had been aware of the proximity where the gun was found in relation to the crime scene, I would have done a regular analysis of it, as opposed to a routine analysis of it...
>
> A regular analysis is a very thorough physical examination of the weapon including test firing of four bullets and a weapons worksheet being made up...

(R. 230-231).

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[5]By some mysterious error, the police lost any records which would have shown the results of any lab tests which had been performed on this gun.

The prosecutor also testified that the proximity of the gun to the murder site together with the other circumstances surrounding the third gun made the third gun a piece of evidence that he would have wanted to know about:

> Q. Would it be your position that this report should have been made available to you?
>
> ROY KAHN [Prosecutor]: Not having been apprised of it, and only in retrospect looking at it and seeing it was in the same vicinity of the crime scene, allegedly the day after, when it was found, I would like to have spoken to the kid who found it and to other people in the area, only for the purpose of in my mind, for the purpose of my prosecution, insuring that there is only one person involved and not more than one. Things of that nature. And also it relates to the physical evidence in prosecuting a case you want to be aware of everything.

(R. 324).

The court below erroneously found that here only general requests were made under the Brady rule, and that "this gun was not given to the Defendant, since the lead detective didn't feel it was involved in this crime." (Supp.R. 94).

But under the circumstances here, a request can hardly be more specific than paragraph number 4 of the Demand for Favorable Evidence which requests "any police investigation report ... which tends to establish the Defendant's innocence or to impeach or contradict the testimony" of any state witness (R. 518).

The lead homicide investigator testified that prior to trial she placed a copy of the police investigation reports concerning the third gun in the police file folder on Arango (R. 113; 115).

> Q. Your processing of the gun was all part of the investigation surrounding the Arango Homicide; was it not?

DEBORAH YOUNG WILEY: Yes.

Q. You would have had no interest in the gun, other than the fact that you were involved in the Arango homicide investigation?

DEBORAH YOUNG WILEY: That is correct.

Q. It was referred to you because you were the lead homicide investigator in the Arango homicide investigation?

DEBORAH YOUNG WILEY: Yes.

Q. As a result, according to what your statement is, you placed a copy of this incident report regarding the location of this gun in your file, or police investigation file, in the Arango matter?

DEBORAH YOUNG WILEY: Yes.

(R. 114-115).

* * *

DEBORAH YOUNG WILEY: ...According to our records division, there was a gun registration slip, and the persons's name that was on that registration slip--we attempted to make contact with that person...

Q. Where would that information regarding the registration slip be located, in you police report file?

DEBORAH YOUNG WILEY: Yes.

I did put a copy in the police report file.

Q. So that there was an apparent name of a registered owner with an apparent address?

DEBORAH YOUNG WILEY: Yes.

Q. For that particular gun?

DEBROAH YOUNG WILEY: Yes.

(R. 118.)

* * *

> Q. You would have put this report along with the incident report, the property receipt--would you get a copy of the property receipt from also for the gun?
>
> DEBORAH YOUNG WILEY: Yes.
>
> Q. You would put all that in the case file?
>
> DEBORAH YOUNG WILEY: Yes.
>
> Q. Along with the registration information?
>
> DEBORAH YOUNG WILEY: Yes.

(R. 129.)

Therefore the proximity of the third gun to the murder site, taken together with the fact that Arango had directed the attention of the police to the bedroom balcony for substantiation of his defense and that the gun was cross-referenced to the murder, can lead to no other conclusion than that the demand for discovery was specific as contemplated by the second category of Agurs. Accordingly a new trial or punishment hearing is warranted since the deliberate nondisclosure "might have affected the outcome of the trial."

It behooves the principle of a fair trial sought to be protected by the dictates of Brady v. Maryland, to allow the state to withhold specifically requested police investigation reports of a gun found near a murder in exactly the location where the accused tells police that evidence of the true murderer can be found, particularly when "any police investigation reports" are requested by the defense, and those reports are in the police file for the prosecution of that defendant. It is impossible to conceive that such a demand could

more specifically request the withheld information. The request clearly put the state on notice of the type of information the defense sought.

Although the lead detective initially directed that the gun be cross-referenced to the Arango prosecution, she later changed her mind and deliberately withheld all information and investigation reports from Mr. Arango.

The sole reason that this evidence was concealed is because the lead detective, on her first murder case, considered all of the information available to her and decided that she did not believe Mr. Arango's defense that three other men committed the murder (R. 125-126). The constitution cannot countenance police suppression of favorable evidence based merely on the whims of a rookie police detective, especially where a man's life is at stake. It is the province of the jury, and not the discretion of a police officer to determine guilt or innocence. C.f., State v. Counce, 392 So.2d 1029 (Fla. 4th DCA 1981).

The trial prosecutor's testimony rebukes the police conduct as gently as can be:

> ROY KAHN [Prosecutor]: ...I am the one prosecuting the case as a lawyer. Not the lead Detective. There may be something she feels is not important or unrelated and I may feel it is important and related. That is why it is my position to get every report from everybody involved in the case, every property receipt, everything connected with the case, so I can make that determination, what is relevant, what is not and what is the best possible evidence in presenting my case to a jury. That is why I went to law school.

(R. 324).

The court analyzed the materiality by asking "[W]as this gun material to this crime?" (Supp.R. 94). The court erroneously focused on whether there was sufficient evidence before the court to positively prove that the third gun was <u>used</u> in the murder of Posada.

The court made a finding that "I find that the gun in question here may or may not have been in the apartment." (Supp.R. 94). The court below went on to speculate,

> THE COURT: Maybe had Mr. Arango not testified, it might have been -- we can sit here and guess all day as to how the outcome might have been, whether the jurors would have disagreed, but the fact is that they did not disagree and they came to a decision.

(Supp.R. 94).

A careful review of the Demand for Favorable Discovery (R. 518-519) in light of the totality of the circumstances shows that the court below erred as a matter of law in finding that the Demand for Favorable Evidence (R. 518-519) was a general request and not a specific request. Therefore the court below applied the wrong standard of materiality. Moreover, even applying that more strict standard, there is no substantial competent evidence to support the court's conclusion that the withheld third gun would not create a reasonable doubt.

D. THE PROSECUTION PRESENTED AN INCOMPLETE AND THUS INACCURATE CHAIN OF CIRCUMSTANTIAL EVIDENCE THEREBY PREVENTING A FAIR TRIAL UNDER ANY MATERIALITY TEST.

Here the prosecution clearly violated the dictates of due process defined in Brady v. Maryland and United States v. Agurs, and denied Mr. Arango a fair trial, when the deliberate actions of the lead investigator are measured against any of the three standards of materiality.

In the instant case, just as in Barbee v. Warden, 331 F.2d 842 (4th Cir. 1964), the police allowed the prosecuting attorney to put evidence before the jury from which an inference of guilt could be drawn, without informing him of other evidence in their possession which contradicted this inference. "The cruelest lies are often told in silence," Barbee v. Warden, 331 F.2d at 846.

The issue of the utility of the evidence withheld and the degree of prejudice necessary to require reversal must also take into account the considered decision to suppress taken by the police without which the high value of the gun would not have escaped the state attorney's attention. In cases of deliberate suppression "almost by definition the evidence is highly material" United States v. Keogh, 391 F.2d at 147; Accord, Ogle v. Estelle, 641 F.2d 1122, 1126 (5th Cir. Unit A 1981).

Here, the lead homicide investigator admitted that for her own reasons, she deliberately withheld information that the third gun had been found under the balcony, which would have confirmed Mr. Arango's initial statement to the police that he was innocent and

that three armed men killed Posada and one escaped off the bedroom balcony.

The case _sub judice_ is a classic example where the inference strongly projected by the state's evidence would have been destroyed by evidence of the third gun in police possession, but which the police concealed from the court, from defense counsel and also from the state's attorney. In assessing the nondisclosure in terms of due process, the focus must be on the essential fairness of the trial.

The state deprived Mr. Arango of the most crucial pieces of defense evidence, thus crippling his ability to rebutt the otherwise harmful inferences from the state's physical evidence.

Here the police allowed the prosecutor to create an illusion of a chain of circumstantial evidence which, although unknown to the jury, was missing essential links. It may not be true that any individual piece of circumstantial testimony presented in court was perjured or any individual piece of evidence was false. However it also cannot be said that a true picture was presented to the jury as to Mr. Arango's innocence or guilt. Moreover, the state prevented defense counsel from conducting an effective and meaningful sentencing hearing on the delicate question of life versus death.

The lead homicide detective, who made the deliberate decision to conceal the third gun, did not testify at trial. However, Mr. Kennington, the firearms expert, did testify at trial about only two guns and several projectiles found in the apartment (F.R. 579-588).

Mr. Kennington was asked, "Were there any bullets that were sub-

mitted to you by the Crime Scene Technician <u>which may or may not</u> be consistent with this type of gun [a revolver]?" (F.R. 582). He was also asked, "Were any projectiles submitted to you for examination?" (F.R. 586). Mr. Kennington replied to the latter question, "Yes. I received three projectiles (F.R. 586)...I received two from Technician Turner and one from Technician Stoller." (F.R. 586-87).

But Mr. Kennington was totally silent at trial about the fact that he had also examined a third gun and casing at the request of the lead homicide detective in this case (R. 207-266). Nor did he tell the jury that this gun was in the police property room all during the trial (F.R.579-588). It can hardly be said that the concealed evidence may not have influenced any of the jurors had they known the truth. Even the information regarding the third gun that was known to the police at the time of trial could reasonably have overcome or weakened the circumstantial inferences adverse to Mr. Arango.

At the time of trial the prosecution knew that Mr. Arango, upon questioning at the scene, had told the detective that he was innocent and that he never wavered from that assertion. Indeed, it was announced on the record that Mr. Arango had rejected the state's plea offer of life imprisonment and instead pled not-guilty and demanded a trial. (F.R. 348-349).

At the time of trial the prosecution knew that Mr. Arango, upon questioning at the scene, had told police that at least one of the armed intruders had escaped over the bedroom balcony. (R. 433).

At the time of trial the prosecution knew but did not tell the

jury, that a third pistol and spent casings had been found directly under the bedroom balcony (R. 433).

At the time of trial the prosecution knew, but did not tell the jury, that that third pistol had been purchased just two days before the murder and that the state had in its possession the registration document showing that it belonged to one Antonio Garcia and not to Arango.

Just the above information which the state had in its possession and control all during the trial would certainly have elevated Mr. Arango's defense theory from the "story" (F.R. 778) as it was characterized by the prosecutor in closing argument, to a reasonable hypothesis of innocence. The jury was therefore misled:

> PROSECUTOR: There is no possibility of a doubt ... because of the physical evidence, ladies and gentlemen, the sixty some exhibits, cannot be made to tell anything but the truth. Nobody can come up here and accuse the physical evidence of lying on the stand, nobody...
>
> It's tangible, you can hold it. You can feel it. It seems you can even smell it, but it's real, it's not a story, it's real.
>
> Now, what the defendant said on the stand, that's a story and that's not real because it does not jive with the physical evidence...

(F.R. 778) [Emphasis added].

The prosecution's entire case was based on the fact that Mr. Arango's recitation of the facts did not "jive with the physical evidence" (F.R. 778). That was correct only because the prosecution concealed pivotal physical evidence that would have jived with Mr. Arango's statement made to the officer at the scene. The prosecutor

persuasively explained to the jury in closing argument why, without the concealed evidence, Mr. Arango's testimony did not create a "reasonable doubt":

> PROSECUTOR: Now, the projectiles, they match. It's all pieces of evidence. <u>If they didn't match</u>, if it wasn't .22 calibers in this man's head that caused the bullet holes, if it was something else, I'm sure the jury would say, <u>Mr. Arango, your story makes sense</u>...
>
> Ladies and gentlemen, reasonable doubt, that's the key. The defendant took the stand in this case, gave you a story, and <u>the facts that he gave you are inconsistent with the state's case but that does not create a reasonable doubt...You have got to go by the evidence as to what occurred</u>, by the evidence in this case.
>
> ...[B]y him taking the stand, we have two sides to a story but that does not create a reasonable doubt. That creates a possibility of a doubt and there is a difference.

(F.R. 793-794).

Since the third gun broke the chain of circumstantial evidence, it clearly would have provided a reasonable doubt that did not otherwise exist. Also, disclosure of the third gun would have provided the jury with a "reasonable" basis upon which to consider one of the lesser-included homicide verdicts.

The prosecutor told the jury the state has "a strong circumstantial case" because "the only evidence is circumstantial pieces, strong pieces <u>all</u> pointing fingers to this man [Arango]" (F.R. 782).

Then he exhorted them to find Mr. Arango guilty because the physical evidence did not corroborate Arango's account that three others killed Posada, then one of them jumped off the bedroom balcony. But the jury was falsely told by the prosecutor:

> This was the evidence, nothing was kept from you, whatever we had is on the table. You make the decision. I've done my job. [Emphasis added.]

(F.R. 821).

The state's deliberate failure to disclose favorable evidence, also deprived Mr. Arango from confronting his accusors and deprived him of developing his defense. C.f., Johnson v. State, 249 So.2d 470 (Fla. 3d DCA 1971); Accord, Krantz v. State, 405 So.2d 211 (Fla. 3d DCA 1981).

At the hearing below, Mr. Arango's trial attorney outlined some of the ways he would have further made use of the third gun to prove Mr. Arango's innocence. If the state had disclosed the third gun, defense experts would have examined the gun for blood, hair, clothing or other traces which could definitely show whether this gun was used to beat Posada or was inside the apartment. (R. 367) Fingerprint analysis could have matched fingerprints on the third gun to one of the 28 unidentified fingerprints of value found in the apartment (R. 318; 371). It is highly probable that the clerk at the gun shop could have identified the purchaser, since the gun was purchased only two days prior to the murder (R. 368-373).

Without this crucial piece of favorable evidence, Arango's defense counsel was therefore deprived not only of the opportunity to develop the defense theory but also the opportunity to prove his innocence (R. 343-406).

Mr. Arango's trial counsel described how the evidence would have created a reasonable doubt that did not otherwise exist:

> Q. Do you have any doubt, in your opinion, whether the gun material in this case?

* * *

> DEFENSE COUNSEL: ...No doubt whatsoever...And then I would have simply argued to the jury that the man gave a statement, he had no opportunity to plant a gun out there, and what more eloquent evidence could you have for the truth but that the day after, somebody in the neighborhood finds a cocked and loaded gun outside of his window.
>
> Two guns to kill somebody is a little bit much for one person to use. Three guns seems like at least a reasonable doubt, which is what we need as defense attorneys.

(R. 374-375) [Emphasis added].

Dr. Tate testified that the cause of death was a combination of multiple gunshot wounds to the head, blunt trauma, and strangulation, each sufficient to cause death and all occurring at or before death. At the sentencing hearing the doctor again testified as to the nature of the wounds, identifying nine (9) distinct lacerations caused by blunt trauma, consistent with pistol whipping, in the head area.

The state forced the jury to rely totally upon incomplete and thus misleading circumstantial evidence to determine whether three armed latin men killed Posada then leaped off the bedroom balcony, as Mr. Arango described, or whether Mr. Arango single-handedly performed those great feats of physical violence leading to Posada's death. The withheld evidence surely might have affected the jury's consideration of this perplexing murder.

The third gun is an important break in the chain of circumstantial evidence against Mr. Arango. In the context of the violent crime with which Luis Arango was charged, the impact upon the jury

is incalculable if they had known about the third gun, purchased just two days before the murder by someone other than Arango, and found directly under the bedroom balcony where the murder took place. C.f., Miller v. Pate, 386 U.S. 1, 87 S.Ct. 765, 17 L.Ed.2d 690 (1976).

Mr. Arango's trial counsel testified how the third gun "might have affected the outcome":

> VINCENT FLYNN: My feeling, as an attorney, is this. If the jury had been presented with a third gun outside the window, the balcony window where Mr. Arango had said the people had fled, which in and of itself is unusual for a man to say they would flee out the balcony window rather than all out the door, if the jury had had that gun, and as I understand it now, the gun was loaded and cocked, without knowing any more than that, I believe the jury, if the jury had not acquitted Mr. Arango, the jury would have been inclined to find him guilty of second degree murder.
>
> And the reason I say that is this. In my experience, both in my cases and on other murder trials that I have seen or participated in on a more limited basis, a jury doesn't want to convict anybody of first degree murder unless he is the triggerman and they know exactly what happened.
>
> So if there were only two people inside that apartment, Mr. Arango and the decedent, the only verdicts that really rationally makes sense are first degree murder or an acquittal. He either did it or he didn't do it.
>
> On the other hand, if there were other people in the apartment, as Mr. Arango said, then even if the jury did not believe that Mr. Arango was telling the entire truth, and that certainly is the perrogative of the jury, the jury still would have known there were other people inside the apartment, and the jury would not have known, no one would have known who did what, who pulled the trigger, what were the circumstances, was it four against one, three against two.

> They would not have known any of that. And that alone, I strongly feel would have justified a verdict of second degree murder.
>
> I have seen any number of homicide cases where three or four people are involved in a murder and even though technically under the law, the jury would be justified in finding all four of them guilty of first degree murder on an aiding and abetting theory, in practice, the jury will tend to convict the triggerman of first degree murder and find the other people guilty of second degree murder, which is probably a just verdict in most cases.
>
> Q. In your professional opinion, do you have any doubt that the gun and the information regarding the registration of the gun was exculpatory evidence in this case?
>
> A. No. I don't think anybody would have any doubt about that.
>
> Q. Do you have any doubt, sir, in your professional opinion, whether the gun was corroborating evidence of Mr. Arango's statements to the police officer and testimony at trial?
>
> A. No, it was the most -- outside of a person walking into court and confessing they were one of the three banditos, it was probably the most eloquent evidence that we could ask for.

(R. 361-364).

Here, just as in Sellers v. Estelle, 651 F.2d 1074 (5th Cir. Unit A 1981), the concealed evidence was favorable not only as to guilt or innocence, but favorable with regard to punishment.

It is not inconceivable that, had the jury been made aware of this additional evidence (implicating other people in Posada's murder) Mr. Arango, even if found guilty of first degree murder as a co-defendant, but not as the actual "triggerman") might have recommended a lesser sentence. See, Sellers v. Estelle, supra.; United States v. Baldi, 195 F.2d 815 (3d Cir. 1952) (See, R. 364).

In regard to the sentence, the death sentence here was imposed based upon the most precarious balancing of aggravating and mitigating circumtances. The trial judge found only one aggravating circumstance to apply, that is, that the crime was especially heinous, atrocious and cruel. On the other side, one quite significant mitigating circumstance was applied, that is, "Mr. Arango's total lack of prior criminal activity." Arango v. State, 411 So.2d 172, 174 (Fla. 1982).

The question of fundamental fairness rising to the level of constitutional due process cannot be treated lightly, especially when the ultimate, irrevocable punishment of death is at stake.

If the third gun had been disclosed to Mr. Arango's attorney and to the jury it might well have influenced the verdict or sentence. One cannot possibly say with confidence that the deliberate concealment of evidence coroborating the accused's defense of innocence in a purely circumstantial case is a harmless defect in his bifurcated trial. A trial so plagued with the tendency to harm makes a mockery of the due process clause and requires reversal.

CONCLUSION

Luis Carlos Arango respectfully requests this court to reverse his conviction for first degree murder or reverse his sentence of death by electrocution and remand for a new hearing because Mr. Arango's trial and sentencing hearing did not comport with the principles of due process.

The state deliberately withheld evidence crucial to his defense theory despite defense counsel's specific demands, thus preventing a fair trial.

Respectfully submitted,

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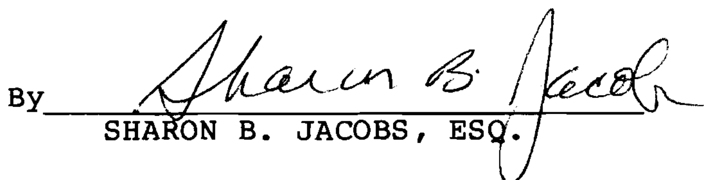
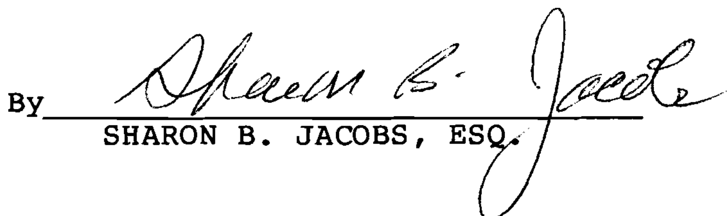


By ______________________
SHARON B. JACOBS, ESQ.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was mailed this 13th day of July, 1984, to Calianne Lantz, Assistant Attorney General, 401 N.W. 2nd Avenue, Miami, Florida, 33128.



By ______________________
SHARON B. JACOBS, ESQ.