IN THE SUPREME COURT OF FLORIDA

CASE NO. 64,721

LUIS CARLOS ARANGO,

Appellant,

vs.

THE STATE OF FLORIDA,

Appellee.

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* * *

REPLY 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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THE STATE'S DELIBERATE CONCEALMENT OF SPECIFICALLY REQUESTED PHYSICAL EVIDENCE WHICH CONFIRMS MR. ARANGO'S OTHERWISE UNSUPPORTED DEFENSE VIOLATES THE DICTATES OF BRADY v. MARYLAND AND REQUIRES A NEW TRIAL OR SENTENCING HEARING.

The state, in its answer brief, does not contest that requested evidence was deliberately concealed by the police. The state in its answer brief agrees, and the law is well-settled, that the police are part of the prosecution team. And the state, in its answer brief, does not challenge Mr. Arango's assertion that the state had an obligation to disclose that a third gun was removed from the murder scene and to disclose all police reports and lab analyses concerning that gun. In fact, the trial prosecutor emphatically testified below that he should have been advised by the police of the third gun and all of the reports connected to it, and that if he had knowledge of it he would have disclosed it to Mr. Arango. (F.R. 324).[1]

Only two legal points raised in Mr. Arango's initial brief are contested by the state, (1) that the written Demand for Favorable Evidence (F.R. 67-68(a); R. 518-519) was specific, and (2) that the deliberately concealed evidence was material to Mr. Arango's convic-

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[1]References to the Record-on-Appeal will be according to the abbreviations outlined in Appellant's Initial Brief at page 1.

tion or sentence, therefore requiring a new trial or sentencing hearing.

A. THE TRIAL COURT APPLIED THE WRONG STANDARD OF LAW TO DETERMINE WHETHER THE STATE'S DELIBERATE CONCEALMENT OF EVIDENCE REQUIRES A NEW TRIAL.

The lower tribunal incorrectly ruled as a matter of law that Mr. Arango made only a general pre-trial Brady[2] request for exculpatory evidence rather than a specific request (R. 93-94). The court below therefore applied the incorrect legal standard under Agurs[3] in reasoning that the withheld third gun, lab reports and police reports concerning it, were not material to Mr. Arango's conviction or sentence. (Supp.R. 88-96).

In light of all of the circumstances known to the state when it received the Demand for Favorable Evidence, the request was "specific" and if the deliberately concealed evidence "might have affected" the jurors or one juror as to conviction or sentence a new hearing is required. The court incorrectly measured the materiality of the concealed evidence against the standard applicable to "general" requests, that is, whether the withheld evidence "creates a reasonable doubt" regarding the conviction or punishment.

The state in its answer brief has totally failed to put forth any argument which could support the trial judge's finding that the

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[2]Brady v. Maryland, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963).

[3]United States v. Agurs, 427 U.S. 97, 96 S.Ct. 2392, 49 L.Ed.2d 342 (1976).

written Demand for Favorable Evidence (F.R. 67-68(a); R. 518-519) was not specific. The state merely makes the bold claim that "those requests are clearly too ambiguous to be characterized as specific requests..." [State's answer brief at p. 8.].

Mr. Arango's request was certainly specific when considered in light of all of the information available to the prosecution at the time the request was made. In Scurr v. Niccum, 620 F.2d 188, 190 (8th Cir. 1980), the Eighth Circuit explained that in determining whether a particular request was specific or general, the court must look to the other knowledge in the state's possession at the time it received the request in order to ascertain whether the request put the state on reasonable notice as to what items were sought.

> [A] request for disclosure of particular information cannot be labeled as either "specific" or general in a vacuum. Rather, the question must be asked whether, under all the circumstances presented by the case, the request was such as to give the prosecution reasonable notice of what the defense desired. In other words, "specificity" is a function of several factors, including the literal language of the defense request itself, the apparent exculpatory character of the evidence sought, and the reasonableness of the explanation, if any, for which the evidence was not exposed or was not considered to be material by the prosecution. [Emphasis added.][4]

Scurr v. Niccum, 620 F.2d 188, 190 (8th Cir. 1980).

Here the state concedes that as soon as the police arrived at the scene Mr. Arango made a statement that he was innocent and that

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[4]The only explanation for why the evidence was concealed from Mr. Arango is that the rookie lead homicide investigator who "did not believe that three intruders were in [the apartment]" (R. 176-176), made an independant decision to conceal the evidence from the prosecutor. (R. 101-148.) She testified below that based upon her present knowledge her opinion has changed as to whether she should have notified the prosecutor. (R. 147.)

three armed men committed the act and one escaped over the bedroom balcony into the parking lot. Detective Nieves testified at the bond hearing as follows:

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

(R. 433). [Emphasis added.]

Several police testified at trial that they went out onto the bedroom balcony (F.R. 454-455; 523) but the trial prosecutor, who was also at the scene, testified below that it began to get dark outside so the police failed to make a search of the outside area under the balcony (R. 322; 110).[5]

The state concedes, however, that the very next day a cocked

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[5]The state in its Answer Brief at pages 5 and 13 incorrectly states as "fact" that "police officers who initially reported to the scene did not even notice a balcony (See T.T. 464) as the area was covered by a curtain" (R. 99). This claim is contradicted by the original trial record.

At the original trial, police technician Seymour Stoller, who prepared the sketch of the scene (State's Trial Exhibit No. 10), testified that he was well aware of the bedroom balcony and, in fact, went out onto that balcony and dusted outside of the sliding glass doors for fingerprints, but was unable to dust the railing. (F.R. 523.) At trial, officer McQue also testified that he noticed the bedroom sliding glass door and balcony (F.R. 454-455). Neither police officer mentioned a curtain.

Technician J. I. Galan, who helped with the crime sketch, testified at trial that he merely did not recall a balcony outside of the sliding glass doors. (F.R. 463-464.) The state also misplaces reliance upon the recollection of the errant lead homicide investigator Deborah Young Wiley, three years after the incident, that there was a curtain over the open sliding glass doors obstructing a view of the balcony. See, Supp.R. 19-20, R. 99; See also, R. 335-336.

pistol was found directly under that bedroom balcony along with casings (R. 182-205). The state further concedes that it knew that the gun had been purchased only two days prior to the murder and that it was not registered to Mr. Arango (R. 403). This clearly precludes any argument that the gun had been lying there abandoned forever and strengthens the inference that the gun was connected to the murder. At the very least, it cannot possibly be argued that the gun was not part of the murder scene. One of the concealed police reports states that at the time that Officer Lake found the third gun he contacted lead homicide investigator Deborah Young Wiley

> ...who advised the weapon could be related to a homicide at [Arango's address] [Arango's police investigation case number] and the lab could not respond to the scene. Detective Young advised to unload the weapon and impound it as found property.

(R. 199.)

The State conceded that it had at least the above information at the time Mr. Arango filed the following demand for Brady material:

> 1. Any...physical evidence indicating that other persons in addition to defendant and the decedent were in defendant's apartment at the time of the homicide. [Emphasis added.]

And Mr. Arango further demanded:

> 3. Any physical evidence or witness statements which corroborate the Defendant's statements to Detective Diaz (sic)[6] that other Latin males entered the apartment and committed the homicide.

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[6]This reference to Detective Diaz is obviously a reference to Detective Nieves. Since Mr. Arango speaks only Spanish, Detective Nieves was the only officer to whom Mr. Arango could and did communicate. Further since Detective Nieves testified at the bond hearing and at trial, it is clear that the state knew to whom this request referred.

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

The above requests must be considered in the context of what the state knew at the time it received these requests. Since the state knew Mr. Arango's only defense included the fact that an armed male leaped off the bedroom balcony, the above demands for favorable evidence certainly provided the state with reasonable notice that any evidence found under the balcony was sought.

Further, since there were no eyewitnesses and the state's entire case against Mr. Arango was based on the circumstantial evidence found at the scene, the following request specifically put the state on notice that the defense sought police investigation reports and lab analysis reports of any third weapon found at or near the scene which tended to corroborate Mr. Arango's statement of innocence as told to Detective Nieves:

> 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. [Emphasis added.]

(F.R. 67-78(a); R. 518-519.)

Finally, even the request for

> 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. [Emphasis added.]

(F.R. 67-78a; R. 518-519.)

provided adequate notice to the state, since the "murder weapon" was never established. Although the gun that fired into the decedent was found in the apartment, the cause of death included multiple

blunt trauma which could have been caused by the butt of the third gun found directly under the bedroom balcony. In addition, fingerprints were found on the two guns in the apartment, but the prints did not belong to Mr. Arango. We will never know whether a fingerprint on the third gun matched any of the 28 unidentified prints inside the apartment (F.R. 573), because as the state concedes, it lost the lab reports of tests conducted on the third gun and no longer has possession of the gun.

Where there is uncertainty as to whether to characterize a demand for Brady material as specific or general, courts have stated that the Agurs standard for specific requests should be used. See, United States ex rel Marzeno v. Gengler, 574 F.2d 730, 736 (3d Cir. 1978); King v. Ponte, 717 F.2d 635, 640 (1st Cir. 1983); Chaney v. Brown, 730 F.2d 1334, 1343-44 (10th Cir. 1984).

In a death penalty case it is especially appropriate to characterize a Brady request as "specific" rather than "general" when there is uncertainty concerning the characterization of a request. Chaney v. Brown, 730 F.2d 1334, 1344 (10th Cir. 1984). There is also an additional factor that must be considered in the instant case which require the application of the standard pertaining to "specific" requests.

Here the state concedes that the police deliberately concealed not only the actual physical evidence, but also all of the police reports, lab analysis reports and investigative reports showing the place and date of purchase and to whom the gun was registered. Here the police went further than merely failing to disclose the exculpa-

tory evidence; the state actually deliberately concealed the favorable evidence. Not only did the prosecution team fail to provide the requested material upon written demand for Brady material, but upon being questioned during her pre-trial deposition, lead homicide investigator Deborah Young Wiley flatly told defense counsel that she had not had any further involvement in investigating the murder for which Mr. Arango was charged (R. 150-181). She purposely failed to disclose her extensive involvement tracing ownership and ordering lab tests of the third gun, despite the fact that the property receipt and request for lab tests are clearly cross-referenced to the Arango prosecution file number (R. 150-181).

This case is more analogous to the first Agurs category where the prosecutor knew or should have known that the state's case included false or perjured testimony. Here the police concealed the exculpatory evidence from the prosecutor as well as the defense, however from the perspective of whether Mr. Arango received a fair trial it makes little difference. Since the Brady rule is not designed as a prophylactic measure but rather to ensure fair trials, where there is uncertainty as to how to characterize a request, here, the unusual facts, as conceded by the state, tip the scale in the direction of applying the standard for specific requests.

The Lab Analysis Request indicated that the gun was "possibly involved in a homicide at [Arango's address], Case #97865-A." (R. 252; 203.) And the police property receipt, reproduced below, clearly marked the third gun as "trial evidence" and "lab evidence" (R. 251), and also made reference to Arango's prosecutor, Roy Kahn:

DADE COUNTY, FLORIDA X-REF: 97865-A **PROPERTY RECEIPT**

☐ STOLEN PROPERTY ☒ TRIAL EVIDENCE ☐ HOMICIDE-PROBATE 354/17
☒ FOUND PROPERTY ☒ LAB EVIDENCE ☐ OTHER AGENCY

CASE NO.	DATE-TIME IMPOUNDED	PROPERTY BUREAU LOCATION	INVENTORY NO.
89165-A	03/29/80 - 4 PM		

ADDRESS WHERE PROPERTY IMPOUNDED (Give exact location where property was located): 5725 S.W. 72 CT. P/10 LAKEVIEW SCHOOL
TYPE OF CASE: Homicide

DISCOVERED BY (Name): [illegible], CARL ADDRESS: 5725 S.W. 72 CT P/10 PHONE NO: 595-2261

OWNER / VICTIM: unknown ADDRESS: — PHONE NO: —

SUBJECT / SUSPECT: — INCARCERATED ☐ YES ☐ NO WARRANT ☐ YES ☐ NO

ITEM NO.	QUANTITY	DESCRIPTION
1	1	380 CAL AUTOMATIC SERIAL #235459S WALTHER (PPKS)
2	6	W.W. 380 AUTO ROUNDS AND SHELL CASING [illegible] ITEM
		According to [illegible]
		Interarms 5/17/79
		Tamiami 2/14/80 [illegible]
		SAT: [illegible]
		REF:

I hereby acknowledge that the above list represents all property taken from my possession and that I have received a copy of this receipt.

I hereby acknowledge that the above list represents all property impounded by me in the official performance of duty as a Deputy Sheriff.

DISTRICT OR DIVISION: [illegible] BADGE NO.: 2807

[signatures illegible]

STORAGE 03-29-80

(R.251.)

Based upon the foregoing the court below erred as a matter of law in characterizing the demand for Brady material as "general" rather than "specific", and therefore applied the wrong standard to determine whether Mr. Arango should be re-tried or re-sentenced.

B. THE COURT BELOW ERRED IN DENYING MR. ARANGO A NEW TRIAL.

The original trial prosecutor conceded that the rookie lead investigator was wrong to withhold the third gun information from Mr. Arango. The prosecutor testified:

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

(R. 320.)

The argument of the state on appeal is that the concealed information was not "material" because "there is no constitutional requirement that the prosecution make a complete and detailed accounting to the defense of all police investigative work on a case", and "the mere possibility that an item of undisclosed information might have helped the defense, or might have affected the outcome of the trial does not establish "materiality" in the constitutional sense under the Agurs test for a specific request. [State's answer brief at p. 14.]

Of course if the police had failed to advise Mr. Arango that they removed from the apartment an additional .22 caliber bullet or some other piece of physical evidence of no consequence, the suppression would have been harmless error. Likewise this case is readily distinguished from Francois v. State, 407 So.2d 885, 889 (Fla. 1982), the only Florida case relied upon by the state.[7] In

[7]The other case relied on by the state, Murzyn v. United States, 578 F.Supp 254, 256 (N.D. Ind. 1984) (regarding a withheld deposition useful only to impeach a witness) is not relevant to the facts herein.

Francois the newly discovered evidence provided the defendant an alibi at a time after the murders occurred and was therefore irrelevant. In Francois the state presented a strong case at trial, including two surviving eyewitness victims. Here there were no eyewitnesses to the murder other than Mr. Arango.[8]

Indeed, this case is the antithesis of Francois. Here the state relied upon very thin circumstantial evidence. It was only the total lack of any evidence corroborating Mr. Arango's claim that three armed men were in the apartment that allowed the jury to find that Mr. Arango had single-handedly committed multiple acts of violence upon the deceased, all of which occurred within a five-minute time span according to the medical examiner (F.R. 904).

The probative significance of the "third gun" is not its mere existence, but all of the related information, which the state also concealed, which creates the inference that there were three armed men in the apartment.

The undisputed fact that the gun was found directly below the bedroom balcony[9] from which Mr. Arango said one of the men jumped

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[8]Here not one of the neighbors who testified was in a position to view the bedroom balcony and therefore there is no evidence in the record capable of rebutting Mr. Arango's claim that one of the armed murderers escaped off the bedroom balcony (See, F.R. 533-537; 538-545; 545-555; 555-559). C.f., State's Answer Brief at page 5.

[9]The state (in it's Answer brief at pages 2 and 9) attempts to downplay the location of the deliberately withheld third gun. The record contains uncontradicted testimony that the third gun was located on the ground one foot to the right beneath the railing of Mr. Arango's second-floor bedroom balcony. (See, police report at R. 199; testimony of Tom D'Azevedo at R. 292; and Diagram labeled Defendant's Exhibit F.) Defendant's Exhibit F diagrams the exact location of the third gun as marked by the circled number 2, and is further denoted by a white area

immediately elevates Mr. Arango's otherwise unsubstantiated and self-serving statement to a high probability. The additional withheld information leads to the inescapable conclusion that the concealed evidence "might have affected" at least one of the jurors, and indeed "creates a reasonable doubt that did not otherwise exist" that three armed men actually were in the apartment and committed the murder.

In addition to the location of the gun and the fact that it was a "third" gun, the concealed police records conclusively show that the third gun was purchased only two days before the murder by Antonio Garcia from the Tamiami Gun Shop (R. 403). Further the gun was found lying in a cocked position. The record contains the uncontradicted testimony of the private investigator, who was a former Metro-Dade Police Officer that the cocked gun is consistent with either being dropped as someone jumped off the balcony in flight or tossed off the balcony (R. 304).

It is the cumulative effect of the sum total of concealed information about the gun that constitutes critical evidence. It is not one piece. The state in its brief seems to overlook the fact that Appellant used the term "the third gun" as a shorthand term to include all of the withheld information, including the withheld police and lab reports.

In addition to the above valuable defense evidence that was concealed, it is of further import that the state conceded that it

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with little black dots in it. (R. 291-292).

subsequently "lost" its records of the lab and ballistics tests that were performed on the gun (R. 207-259). So that at the time of the Brady hearing below the police firearms expert testified that although he received the Lab Analysis Request form requesting him to perform tests on the third gun, he was unable to determine what were the results of those tests because he had apparently misfiled his report (R. 207-259). Further the state admitted that the entire original trial file of the State Attorney's office had been lost. (Supp.R. 327-329).

The most persuasive argument that if all of the deliberately concealed evidence had been made available to the defense it surely might have affected at least one juror, is that the prosecutor's theme in opening and closing argument was that physical evidence does not tell lies (F.R. 778). The prosecutor repeatedly exhorted the jury to restrict their verdict to the physical evidence and falsely, albeit unknowingly, promised the jurors that "this was the evidence, nothing was kept from you, whatever we had is on the table" (F.R. 821). The state's total case against Mr. Arango was, as the prosecutor told the jurors, "...what [Arango] said on the stand, that's...not real because it does not jive with the physical evidence." (F.R. 778).

The prosecution team prevented Mr. Arango from rebutting those accusations of the prosecutor. The third gun was in the police property room at the very moment that the prosecutor told the jurors to look for any physical evidence which could possibly support Mr. Arango's defense that three other men committed the crime, then one

armed man jumped off the bedroom balcony.

The prosecutor cleverly explained to the jurors why Mr. Arango's testimony did not create a reasonable doubt necessary to aquit Mr. Arango:

> PROSECUTOR: ...[B]y [Arango] taking the stand, we have two sides to a story but that does not create a reasonable doubt. That creates a possibilty of a doubt and there is a difference.

(F.R. 793-794.)

The jury followed the prosecutor's reasoning and, based upon the false illusion of a total absence of any corroborative evidence, physical evidence or otherwise, the jury found that no reasonable doubt existed as to "whodunit." If all of the concealed information regarding the third gun had been put into the hands of Mr. Arango's trial counsel, it cannot be said with certainty that it might not have affected at least one juror, indeed, under the reasoning put forth by the trial prosecutor, it would have created a reasonable doubt that did not otherwise exist.

Here the unfairness involved in a conviction under circumstances where evidence is deliberately concealed from the defendant, is so fundamental as to amount to a denial of due process of law analogous to a situation where a prosecutor allows perjured testimony at trial. The impact upon Mr. Arango is the same regardless of the ignorance of the prosecutor here.

The test of materiality with regard to false testimony or deliberately suppressed evidence is satisfied when such evidence concerns the credibility of the witness. Here the jury was essentially

asked to disbelieve Mr. Arango's unwaivering claim of innocence because the state deliberately concealed all evidence in its possession which would have supported Mr. Arango's defense.

The facts are similar to those in Trimble v. State, 75 N.M. 183, 402 P.2d 162 (1965) where the state impounded and later mishandled certain letters and tapes so that they were unavailable for the defense to use at trial. Since the defendant asserted that the state deliberately suppressed evidence which would have supported his theory of self-defense, the court found the letters and tapes to be material under Brady.

Mr. Arango was unquestionably deprived of his due process right to a fair trial in any sense of the concept and under any of the Agurs standards. This court should reverse Mr. Arango's conviction.

C. THE WITHHELD EVIDENCE REQUIRES, AT A MINIMUM, A NEW SENTENCING HEARING.

The state in its answer brief refers to no law or facts to support its specious one-half page reasoning that the withheld gun would not have been favorable to Mr. Arango for sentencing purposes. Although the Appellant strongly believes that the deliberate concealment of specifically requested physical evidence necessary to corroborate his only defense requires a new trial, a response to the state's clearly erroneous position with regard to sentencing follows.

In Chaney v. Brown, 730 F.2d 1334 (10th Cir. 1984), the United States Court of Appeals for the Tenth Circuit set forth criteria and

reasoning which are equally applicable to the instant case with regard to the need for a re-sentencing hearing based upon a somewhat similar Brady violation.

In the instant case, in recommending that Mr. Arango be sentenced to death, the jury found only one aggravating circumstance beyond a reasonable doubt, that is, that the homicide was considered "especially heinous, atrocious, or cruel." Section 921.141(5)(h), Fla. Stat. (1979). The recommendation of the death sentence is necessarily predicated upon the now questionable finding that Mr. Arango personally killed the victim in such a manner. On the other hand, Mr. Arango established in mitigation his total lack of prior criminal activity. Section 921.141(6)(a), Fla. Stat. (1979). Florida law prohibits the imposition of the death penalty unless the jury determines that any aggravating circumstances are not outweighed by the finding mitigating circumstances." Section 921.141(2)(b), Fla. Stat.

The withheld evidence requires a new sentencing hearing, at the very least, because it would have affected the jury's imposition of the death penalty for the same reasons as discussed in Chaney v. Brown, supra., at 1351-1357.

1. The Concealed Evidence Is Mitigating Evidence Because It Supports The Inference That Mr. Arango May Not Have Personally Killed The Deceased.

First, the evidence withheld here is mitigating evidence because it relates to the circumstances of the offense as a whole, and supports inferences that others were involved in the criminal episode,

just as Mr. Arango had initially told the police, and that Mr. Arango may not have personally killed Mr. Posada. The United States Supreme Court requires that the defendant be allowed to offer as mitigating evidence in the sentencing phase evidence that a third person was involved in murder, rape and aggravated sodomy. See, Lockett v. Ohio, 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978); Eddings v. Oklahoma, 455 U.S. 104, 102 S.Ct. 869, 71 L.Ed.2d 1 (1982). Mr. Arango was prevented from offering such evidence in mitigation in the punishment phase of his trial because the state withheld the third gun which was found directly beneath the bedroom balcony from which Mr. Arango told police one of the murderers had escaped.

Just as in Chaney v. Brown, 730 F.2d at 1354, the principles enunciated in Green v. Georgia, 442 U.S. 95, 99 S.Ct. 2150, 60 L.Ed.2d 738 (1979) (per curiam), apply with special force here. In Green, during the penalty phase the defendant was denied the opportunity to intruduce the testimony of a third party repeating a statement of Green's confederate in the abduction, rape and murder episode. The excluded statement of the confederate confided that he had shot the victim after ordering Green to run an errand. The exclusion of the proof during the penalty phase was held to be constitutional error. The Supreme Court stated:

> Regardless of whether the proper testimony comes within Georgia's hearsay rule, under the facts of this case its exclusion constituted a violation of the due process clause of the Fourteenth Amendment. The excluded testimony was highly relevant to a critical issue in the punishment phase of the trial, See, Lockett v. Ohio, (cite omitted) and

> substantial reasons existed to assume its reliability.

Green v. Georgia, 442 U.S. at 97, 99 S.Ct. at 2151. See also, Chaney v. Brown, 730 F.2d at 134.

2. The Concealed Evidence Undermines The Only Aggravating Factor Applied.

Second, the withheld evidence is significant with respect to the one and only aggravating circumstance found applicable to Mr. Arango, that the murder was "especially heinous, atrocious or cruel". The aggravating circumstance found here by the jury to support the death sentence rests on the presumption that Mr. Arango himself killed Mr. Posada. Because the concealed evidence supports inferences that Mr. Arango may not have been alone in the apartment and therefore not the sole participant in the criminal episode, and may not have personally killed the victim, the evidence might have caused the jury not to find this aggravating circumstance beyond a reasonable doubt. Since only one aggravating circumstance was found to apply, the weight of the withheld evidence is especially heavy.

Evidence of the third gun and the inference from it therefore not only "might have affected" the jurors, or one of them, in recommending the death penalty, but clearly creates a reasonable doubt which did not otherwise exist regarding the only arguably applicable aggravating circumstance as to whether Mr. Arango himself was responsible for the heinous homicide.

The significance of the withheld gun is underscored by Enmund v. Florida, 458 U.S. 782, 102 S.Ct. 3368, 73 L.Ed.2d 1140 (1982). In

the conclusion of its opinion, the Supreme Court held the imposition of the death penalty unconstitutional "in the absence of proof that Enmund killed, or attempted to kill, and regardless of whether Enmund intended or contemplated that life would be taken." Id. at 801, 102 S.Ct at 3379. In this context, the significance of the withheld evidence here is that it tends to undermine the one aggravating circumstance found to support the imposition of the death penalty which was based on a finding that Mr. Arango personally killed Mr. Posada.

3. The Jury Was Prevented From Considering Evidence Supporting Statutory Mitigating Factor Sec. 921.141(6)(d).

Third, the trial judge instructed the jury at the sentencing phase that among the mitigating circumstances it could consider whether "the defendant was an accomplice in the offense for which he is to be sentenced but the offense was committed by another person and the defendant's participation was relatively minor." (F.R. 944.) See, §921.141(6)(d). However the prosecutor argued to the jury at the sentencing phase that there was no evidence to support this statutory mitigating factor, but that was true only because the state had concealed all information about the third gun.

> ROY KAHN [PROSECUTOR]: Briefly, let's turn to the mitigating factors, if any, that exist here...Now, the next one, that the defendant was an accomplice in the offense for which he is to be sentenced but the offense was committed by another person and the defendant's participation was relatively minor.
>
> That's talking about, for instance, a conspiracy to commit murder if there was with Carlos Luis Arango, another person, and the other person pulled the

> trigger, and the other person killed Jario, this man would still be guilty as a principal, in first degree murder but he's only an accomplice; although he's legally responsible for the co-defendant's actions. It is a mitigating factor. There is no evidence of that, there is no co-defendant here.
>
> This man took the guns, he beat Jario, or used another blunt instrument, he beat him, tortured him, strangled him, and shot him, all with his own little hands with the help of nobody. [Emphasis added.]

(F.R. 921; 923.)

The prosecutor had previously told the jury that "there was no possibility of a doubt [as to guilt] because of the physical evidence...and because "what the defendant said on the stand...does not jive with the physical evidence..." (F.R. 778.) And the prosecutor falsely promised the jury that:

> This was the evidence, nothing was kept from you, whatever we had is on the table. [Emphasis added.]

(F.R. 821.)

The argument of the prosecutor would therefore have been undermined, and at least one of the jurors' reactions to this mitigating circumstance might well have been different, if the concealed evidence had been known to the jury.

4. The Sentencing Jury Was Unconstitutionally Prevented From Considering As Mitigating Factors All Circumstances Of The Offense.

Furthermore, the Eighth and Fourteenth Amendments create an additional right to present mitigating evidence to the jury before a death sentence is imposed. The Supreme Court has held that:

> The Eighth and Fourteenth Amendments require that

> the sentencer not be precluded from considering as a mitigating factor any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death.

Eddings v. Oklahoma, 455 U.S. 104, 110-112, 102 S.Ct. 869, 873-75, 75 L.Ed.2d 1 (1982) [earlier emphasis in original, later emphasis added].

"[It] is essential that the capital sentencing decision allow for consideration of whatever mitigating circumstances may be relevant to either the particular offender or the particular offense." Roberts v. Louisiana, 431 U.S. 633, 637, 97 S.Ct. 1993, 1995, 52 L.Ed.2d 637 (1977) (per curiam). It is axiomatic that "the fundamental respect for humanity underlying the Eighth Amendment... requires consideration of the character and record of the individual offender and the circumstances of the particular offense as a constitutionally indispensible part of the process of inflicting the penalty of death." Woodson v. North Carolina, 428 U.S. 280, 304, 96 S.Ct. 2978, 2991, 49 L.Ed.2d 944 (1976) (plurality opinion).

Consideration of mitigating circumstances, such as the withheld third gun, is mandated with regard to sentencing. The United States Supreme Court has repeatedly emphasized that capital sentencing decisions must focus "on the circumstances of each individual homicide and individual defendant." Proffitt v. Florida, 428 U.S. 242, 258, 96 S.Ct. 2960, 2969, 49 L.Ed.2d 913 (1976). The withheld evidence here, considered as a whole in conjunction with the trial record, clearly, might have affected the jury's decision on the death penalty under the Agurs test. This is especially true in this

case where the prosecuting attorney relied heavily on a metaphor that the allegedly unbroken chain of evidence, "strong pieces all pointing fingers to this man [Arango]" (F.R. 782). The withheld information about the third gun with its attendant laboratory analyses and other information, might well have made the jurors, or one of them, doubt this position of the prosecutor. The withheld third gun contained important mitigating evidence supporting the inference that another person or persons were involved in the murder, and that Mr. Arango may not have personally killed Mr. Posada. Moreover, the concealed evidence undermines the aggravating circumstance found by the jury to support the imposition fo the death penalty which was premised on the finding that Mr. Arango himself killed the victim.

As an example of the strong likelihood that the concealed evidence might have affected the sentence, three Justices of this court have on previous occasions expressed the view that life imprisonment and not death is the appropriate penalty here.[10] Indeed Justice McDonald aptly described how the recommendation of sentence could have differed had additional mitigating evidence been presented to the jury:

> ...I also feel that [Arango] is entitled to an evidentiary hearing on the effectiveness of counsel at the sentencing proceeding.
>
> To me this did not appear to be an appropriate death sentence case, and, had available nonstatutory mitigating circumstances been presented,

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[10] Arango v. State, 411 So.2d 172, 175-6 (Fla. 1982), McDonald, J. concurs in part and dissents in part with an opinion, in which Boyd, J. concurs; Arango v. State, 437 So.2d 1099, 1105 (Fla. 1983), McDonald, J. concurring specially with an opinion in which Overton, J. concurs.

others may have reached the same conclusion.[11]

We now know that the state prevented Mr. Arango's trial attorney from presenting not only available nonstatutory evidence, but also statutory mitigating circumstances. It cannot be said that the outcome of the recommended sentence would not have been different if the prosecution team had not deliberately concealed statutory mitigating evidence from Mr. Arango and the jury.

Therefore, the state's deliberate refusal to disclose the third gun and attendant police reports and lab analyses of it after the specific pre-trial request for such evidence amounted to constitutional error. The deprivation of this crucial evidence prevented a fair consideration of the sentence to be imposed upon Mr. Arango. In light of the finality of Mr. Arango's sentence, due process mandates, at the very minimum, a new sentencing recommendation by a jury.

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[11] Arango v. State, 437 So.2d 1099, 1105 (Fla. 1983), McDonald, J. concurring specially with an opinion in which Overton, J. concurs.

CONCLUSION

The Brady doctrine safeguards the all-important precept of fairness in our system of administration of justice.

It cannot be said that Mr. Arango was provided a fair trial where the state deliberately concealed crucial pieces of evidence which were specifically requested and which would have given credibility to Mr. Arango's defense thus creating a reasonable doubt as to the verdict and it clearly might have affected the outcome.

In the alternative, Mr. Arango surely did not receive a fair sentencing hearing where he was deprived of his due process right to offer evidence of a statutory mitigating factor and the withheld evidence would have undermined the one and only aggravating factor. If the sentencing jury had knowledge of the third gun it is more than likely that they would have found two mitigating circumstances to apply. It is even more likely that with knowledge of the third gun that the sentencing jury would have found that the one applicable aggravating factor was outweighed by the mitigating circumstances.

Therefore, based on the foregoing, 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 fairness which are the foundation of our system of justice.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Reply Brief was mailed this 14th day of September, 1984, to Calianne Lantz, Assistant Attorney General, 401 N.W. 2nd Avenue, Miami, Florida, 33128.

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