IN THE SUPREME COURT OF FLORIDA

WILLIE A. BROWN, and LARRY TROY,	:	
Appellants,	:	
v.	:	CASE NOS. 64,802 64,803
STATE OF FLORIDA,	:	69,427
Appellee.	:	
	:	

ON APPEAL FROM THE CIRCUIT COURT
OF THE EIGHTH JUDICIAL CIRCUIT
IN AND FOR UNION COUNTY, FLORIDA.

INITIAL BRIEF OF APPELLANT LARRY TROY

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I PRELIMINARY STATEMENT

Appellant, **LARRY TROY**, was the defendant in the trial court, and will be referred to as appellant or by his proper name. Troy's co-defendant, **WILLIE BROWN**, will be referred to by name. Appellee, the State of Florida, will be referred to as the state.

The record on appeal will be referred to by use of the following symbols:

R: Record on Appeal (Volumes I through III)
T: Trial Transcript (Volumes I through V)
PT: Transcript of Penalty Phase
ST: Transcript of Sentencing Hearing
MNTT: Transcript of Hearing on Motion for New Trial

Deposition transcripts will be identified by the name of the witness and the date the deposition was taken. Transcripts of pre-trial motion hearings will be identified by subject matter and date. With regard to all transcripts, the page number referred to will be the one appearing at the upper right hand corner of the page.

All emphasis is supplied unless the contrary is indicated.

II STATEMENT OF THE CASE

Larry Troy and Willie Brown were charged by indictment returned October 14, 1982, in Union County, Florida, with first degree murder in the death of Earl Owens (R.1). Numerous pre-trial motions were filed on behalf of Troy and/or Brown[1]; these included a motion to dismiss for pre-indictment delay (R.147-49), a motion for discharge under the speedy trial rule (R.156-57), a motion for change of venue (R.378-88, 392-401, see R.366-70), and a motion to exclude correctional officers from serving on the jury (R.224-26). After hearings on March 7, March 11, May 2, and June 8, 1983, these motions were denied. In addition, defense counsel filed a motion in limine to exclude as unreliable the testimony of Frank Wise, on the ground that Wise had given contradictory and perjurious testimony in deposition (R.320-22); and a motion to compel a psychiatric examination of another potential witness, Herman Watson, and to disqualify Watson as a witness on the ground of mental incompetency (R.374-76). In the latter motion, defense counsel asserted, inter alia, that Watson had been shot in the head as a youth and apparently suffered brain damage; that he had been under psychiatric care both before and during his incarceration, and was receiving psychotropic medication; and that he suffers from "noises" in his head which make him say and do things (R.374-75). Both motions were denied (R.327,417).

The case proceeded to trial before Circuit Judge John J. Crews and a jury on June 13-16, 1983. The jury returned verdicts finding both Troy and Brown guilty as charged of first degree murder (R.473-74). Following the penalty phase of the trial, which was held on June 22, 1983, the jury recommended, by 9-3 vote

[1]Each defendant filed a motion to adopt all motions filed on behalf of the other defendant (R.258,302); this procedure was approved by the trial court (R.351-52; transcript of May 2, 1983 hearing,p.83-85).

as to each, that Troy and Brown receive the death penalty (R.487-88). On July 19, 1983, the trial court sentenced both defendants to death (R.505-16). Motions for new trial and for post-verdict judgment of acquittal were heard on November 30, 1983 and denied on December 22 and 27, 1983 (R.489-501, 518-19, 554-58). This appeal follows.[2]

III STATEMENT OF THE FACTS

A. THE TAPE RECORDED STATEMENT OF CLAUDE SMITH

The state, in its answer to demand for discovery filed December 3, 1982, listed 30 potential witnesses (R.20). Twelve of these were inmates in the Department of Corrections; included among them were Claude Smith and Frank Wise (R.20). Among the non-inmate witnesses listed were prison inspector H. Edward Sands and institutional investigator R.T. Lee (R.20).

On January 13, 1983, at 12:30 p.m., counsel for Larry Troy took the deposition of Inspector Sands.[3] Sands stated that the morning after the murder of Earl Owens, he came back to the prison and began interviewing inmates who might have some knowledge of the crime (Sands depo.p.30-31,37). Some 50 to 100 inmates were interviewed during the investigation. According to Sands, it is not uncommon in his experience for inmates to volunteer information which has absolutely no bearing on the case; "[t]hey would sit here and tell a lie just to come out and talk" (Sands, depo.p.30). Ultimately, Sands narrowed it down to about 14 inmates who told him anything "that we felt had some bit of merit." (Sands, depo.p.30-31, 37). One of these was Claude Smith. According to Sands' notes of the interview, which he read to defense counsel at the deposition:

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[2]Troy's direct appeal (Case No. 64,803) and Brown's direct appeal (Case No. 64,802) were consolidated pursuant to this Court's order of May 21, 1985. On March 27, 1986, this Court stayed the appellate proceedings and temporarily relinquished jurisdiction to permit Troy and Brown to apply to the trial court for a writ of error coram nobis. Coram nobis relief was denied on August 22, 1986; the appeal of that ruling is Case No. 69,427. See Issue III, supra.

[3]The deposition of Inspector Sands can be found in what is designated Supplemental Deposition, Volume V of the record (800-873).

> Inmate Claude Smith was interviewed on 7/8/81, alleges to have returned to B Floor on 7/7/81 at approximately 5:00 p.m. and, on B Floor, observed Frank Wise standing at the southwest corner of the floor and appeared to him (Smith) to be standing lookout.
>
> According to Smith, he asked Wise, while en route to the east side of B Floor (to his cell, B-54), to get a cigarette in, as he returned to the area of the pipe alley . . . (Between east/west side of B Floor), he heard someone scream.
>
> Smith stated he then saw Wise at Cell B-3 lift a blanket, which was draped over the cell door, and look in the cell.
>
> Smith indicates he then left B Floor.

(Sands depo.p.38-39; R.290-91).

Lieutenant Lee, whose deposition was taken at 3:45 p.m., prepared the report of the inmate interviews jointly with Inspector Sands.[4] Lee stated that his recollection of the interviews was in agreement with the synopsis contained in the report (Lee depo of January 13, 1983, p.38, 46-48).

At 4:25 p.m. of the same day, Troy's counsel attempted to take the deposition of Claude Smith.[5] The proceedings began in the following manner:

> MR. MAZAR (defense counsel): What is your full name, please?
> CLAUDE SMITH: Could I ask you a question? You all are from whose office?
> MR. TOBIN [prosecutor]: I am from the State Attorney's office and this is Mr. Troy's attorney.
> CLAUDE SMITH: Who is Mr. Troy?
> MR. TOBIN: Well, you are about to tell him you don't know anything about it, I know because you don't and I already have your statement.
> He is a defense attorney and I am the Assistant State Attorney for Union County. What he wants to ask you about is the events which you saw on July the 7th at the Main Housing Unit in the area of B-Floor about 5:00 in the afternoon. Okay.

(Claude Smith depo. p.3)

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[4]The deposition of Lieutenant Lee (1/13/81) can be found in what is designated Supplemental Deposition, Volume IV of the record (604-666).

[5]The deposition of Claude Smith can be found in what is designated Supplemental Transcript of Proceedings, Volume VI (910-918).

Defense counsel asked Smith if he was present on B-Floor at the time in question; Smith replied: "I live there." Smith gave no response when twice asked if he had observed an individual around B-Floor by the name of Frank Wise. (Smith depo. p.4). When defense counsel asked him if he was refusing to answer the question, Smith asked to speak privately with Assistant State Attorney Tobin. Following a short recess, Mr. Tobin stated for the record:

> Mr. Smith is concerned to answer any questions for his personal safety and that is what we discussed in the other room.
>
> At this point, as to any substantive questions, Mr. Smith is going to refuse to answer.
>
> We discussed a couple of things regarding his personal safety, but I am incapable at this time of making him any guarantees or as to any statement of what we could or could not do or what could or could not be done for him.
>
> Because of that, he doesn't feel that, because of his own safety, he can answer questions.
>
> Am I correctly stating what we talked about?
>
> CLAUDE SMITH: Yes, sir.

(Claude Smith depo.p.5).

In response to defense counsel's query, Mr. Tobin acknowledged that there were no allegations of any specific threats, direct or indirect, toward Smith. Rather, Mr. Tobin stated, it was simply that Smith was housed in "the same general area as potential defendants and defendants" and, because of that, Smith felt his life could be threatened. Mr. Tobin continued:

> In other words, he is not under the Evanko Decision. He is not [talking] of invoking the Evanko saying that he doesn't ever have to answer them.
>
> He is simply saying that, until we can discuss those matters with him more fully, he doesn't wish to answer.
>
> MR. MAZUR [defense counsel]: Do you intend to go into this a little bit farther?
>
> MR. TOBIN: Yes, I will. I will at a future date. I am incapable of doing it right now because it is 4:30 in the afternoon.

(Claude Smith depo. p.5-6).

Claude Smith indicated that he would give a statement at such time as the assistant state attorney would be able to assuage his concern for his safety. At the present time, however, "I have got enough problems with living with what I did to come in here [i.e., to prison]. I don't need no more headaches. I take medicine four or five times a day, see, and I got a bad heart. I don't need none of the bull crap. When the time is right, if he say the time is right, I will give you a full statement." (Claude Smith depo. p.6-7).

In June, 1983, a week or more before the beginning of the trial[6], it occurred to Assistant State Attorney Tobin that a deposition had never been taken from Claude Smith (T.497; MNTT.39). For that reason, Mr. Tobin asked Lieutenant Lee to talk to Smith "to find out what he had to say" (T.497; MNTT.39). Lieutenant Lee took a tape recorded statement from Smith (T.497, MNTT.39-40, see T.549). Mr. Tobin obtained the tape from Lieutenant Lee the week before trial (T.497). The existence of the taped statement was not disclosed to defense counsel, however, until the following week, after the trial had commenced[7] (T.497, see MNTT.17-19, 20-21, 39-40, 42-43).

In his opening statement, the prosecutor told the jury:

> Now, the two Defendants were observed leaving the cell with their knives by an inmate, Frank Wise. He will tell you that, in fact, he saw them, he will tell

---

[6]According to the trial testimony of Claude Smith, Lieutenant Lee took a taped statement from him on June 1 (T.549,551), or twelve days before the trial began.

[7]At the hearing on motion for new trial, defense counsel represented that the prosecutor first advised the defense of the existence of the taped statement "on the day of trial, subsequent to jury selection, which may have been the first day of testimony" (MNTT.17-18), after the first witness or first several witnesses had already testified (MNTT.18-19). According to defense counsel, Mr. Tobin commented that the taped statement was "essentially the same as what he (Smith) said before" (MNTT.18). Defense counsel took this as a reference to Smith's statement to Inspector Sands the day after the murder (MNTT.18), in which he said he had seen Frank Wise (who appeared to be standing lookout) lift a blanket which was draped over the cell door and look into the cell; and that he (Smith) then left B-Floor (MNTT. 13).

> you about the incident and he will describe in fact giving a signal to them to indicate that the coast was clear.
>
> There is another inmate that was there at the time, Claude Smith, who will describe the same incident to you.
>
> In fact, the day after, or within a couple of days, Claude Smith began by identifying Frank Wise, thinking that he, in fact, was the lookout.

(T.287).

Larry Troy's counsel, addressing the subject of eyewitnesses in his opening statement, said:

> Now, was there anybody--as the state says, was there anybody really there to see those people exit the cell? Was there anybody there? Yes, there very well was someone there. But that someone who saw the exit was not Frank Wise.

(T.297).

Rather, Troy's attorney continued, an inmate named Noel White saw the two individuals come out of the cell, and they were <u>not</u> Larry Troy or Willie Brown (T.297-99). Counsel suggested to the jury that Frank Wise, the state's purported eyewitness, would be heavily impeached and discredited, by his prior inconsistent statements, by his animosity and bias against Larry Troy, and by his admitted indifference to the guilt or innocence of the defendants (T.300-01). Defense counsel's only comment concerning the anticipated testimony of Claude Smith was this:

> Now, Frank Wise. Frank Wise, is he a witness? Is Frank Wise a witness? Well, you've heard about Claude Smith saw him up there. What kind of witness is Frank Wise? Claude Smith saw him up there peeking in the cell, looking into the cell to see what happened. Well, he categorically denies that. He denies that.

(T.300).

At trial, over defense objection[8] (T.491-500), Claude Smith testified that he heard hollering coming from a cell (B-3) on B-Floor; he remained on the floor and saw two black males come out of the cell (T.536-37, 541-42). He identified the defendants, Troy and Brown, as the individuals he saw (T.537). Claude Smith testified that he was standing about a foot away from Frank Wise when the two men came out of the cell (T.542,546). There was a blanket over the door of the cell (T.543), but the only thing Smith saw Frank Wise doing was leaning up against the big steel door (which was the entrance to B-Floor as you come up the stairs) and, on one occasion, waving his hand (T.540-41, 546-47). Claude Smith further testified that he followed the two black males down the stairs into the shower area (T.536, 538, 543-44). Smith then started back upstairs, where he encountered the white inmate who had been stabbed trying to make his way downstairs to the hospital (T.538,544-46). Smith said he helped the white man walk down to the bench; after that the stretcher bearers came and took him to the hospital (T.538, 544-46). Then, according to Smith, he went and told Sergeant Blum "that the two guys he was looking for had ran up in the shower area" (T.538).

B. THE TRIAL

The following is a summary of the evidence introduced at trial.

Dr. William Hamilton, the district medical exmainer, conducted an autopsy on the body of Earl Owens, and determined that the cause of death was multiple stab wounds and cuts (T.311, 316). Dr. Hamilton found 62 stab wounds and slashes,

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[8]The defense objection to Claude Smith's testimony was made on two separate and distinct grounds. The first objection, based on the witness' refusal to answer questions on deposition (T.491-96), is not being raised as an issue in this appeal. The second objection, based on the state's violation of the discovery rules in failing to timely disclose the tape recorded statement made by Claude Smith to Lieutenant Lee, was raised separately at trial by defense counsel (T.496-98), and is presented in this brief as Issue I on appeal.

along with about 20 superficial cuts, distributed over the face and body (T.316, see 318-21). It appeared to Dr. Hamilton that the wounds were inflicted by more than one knife (T.321, 323-24).

The injuries which Dr. Hamilton pointed out to the jury would have caused the victim to bleed profusely from penetrating and perforating wounds of the major organs (T.324-25). A person with such injuries, unless he obtains medical treatment "whereby they get his blood pressure up and they give him IV's," goes into hemorrhagic shock, which means that he becomes unconscious or blacks out (T.325). Hemorrhagic shock, Dr. Hamilton stated, is the mechanism whereby the injury produces death (T.325). It was Dr. Hamilton's professional opinion, based on his background and study in the area of forensic pathology (T.332), that Earl Owens probably received the injuries within a short period of time before he presented for medical treatment, probably within ten minutes (T.331-32, 338). That opinion was based on the fact that Owens had suffered stab wounds to vascular areas which would have resulted in sufficient loss of blood internally to put him in a state of hemorrhagic shock within a short period of time (T.333). Dr. Hamilton testified that it was "highly unlikely" that there was a significantly longer lapse of time between the infliction of the injuries and the arrival of the victim for medical treatment (T.331-32, 338-39). He said:

> If one were to present incontravertible proof that those injuries were received as long as a half hour before, I would say it is not impossible, but I would be very, very surprised.

(T.332).

Dr. Hamilton further testified that before shock set in, since the victim did not receive any injuries to the legs or buttocks, it would have been possible for him, within a short time after receiving the injuries, to walk a considerable distance to ask for help (T.333-34). Prior to the onset of shock, or in the earlier stages of that syndrome, Dr. Hamilton would expect that he would be conscious and able to relate what happened to him (T.334).

Frank Wise testified that he was housed in the Main Housing Unit (known as the Rock) of Union Correctional Institution on July 7, 1981 (T.341-42). Wise was living on G-Floor, but he had occasion during the late afternoon to go to B-Floor, in order to obtain some sugar to make "homebrew wine" (T.343-44). Wise testified that he was on B-Floor around 5:00 o'clock (T.343), "I knew it was around 5:00 o'clock because the whistle blows every afternoon at exactly 5:00. And I was there a few minutes before 5:00 before the whistle had blown" (T.343).

The inmate Wise was looking for wasn't home, so he decided to stand at the head of the stairs at the far side of B-Floor to wait for him, and to see if maybe he'd gone up a flight to C-Floor or down a flight to A-Floor (T.344-45). Wise stood there for about five minutes, during which time he heard sounds like "uh, uh, uh" (T.345). He surmised that what was going on was either a homosexual beating or rape (T.345). Wise testified:

> If it had been a loud scream then I would know it was someone getting seriously hurt. But it sounded like when you [whip] a kid. You hit them with a belt and they say, "Uh," a blunt sound. This is what I heard.

(T.345).

There was a blanket above the cell door (T.345). Wise became curious to the point where he wanted to peek in the cell (T.345). He started to the cell, and then caught himself; "...you know, by being in prison you just don't get involved in people's business" (T.345). So he backed up and stood at the head of the steps (T.345). An inmate named Singleton came upstairs, and another inmate, Smith, passed by Wise going over to the "high side" of B-Floor.[9] A few minutes after

[9]The Main Housing Unit is divided into three areas, each containing three floors; these are A,B,C Floors; D,E,F Floors; and G,H,J Floors (T.342). Between the sets of floors are little courtyards (T.343). Each floor contains two sets of hallways, running parallel to one another, with a pipe alley in between (T.344). The "low side" is where Cells 1-30 are located; the "high side" is where Cells 31-60 are located (T.344,357). To get from the low side to the high side, one must turn a corner and go across a connecting hallway (T.359-60).

that, someone stuck their hand out of Cell B-3, unlocked the door, and two inmates came out of the cell (T.346). These two inmates, Wise testified, were Larry Troy, better known as Scuffy Ray, and Brown, better known as Bama (T.347). Wise further testified:

> ...when they came out of the cell, I looked this way and I looked that way and I didn't see no traffic, didn't see nobody, so I simply did this right here (indicating) on the strength that I knew them two dudes that come out of this cell. And I was letting them know that there wasn't nobody in the area to see them come out becasue I felt they had been doing something wrong.

(T.346).

Wise did not look close enough to see if there was any blood on either of them (T.348). He did not see a weapon, but he speculated that it was wrapped up in a towel or whatever they were carrying.[10] Wise testified, "They passed by me and went downstairs to the barber shop" (T.348). Wise then left B-Floor to change his clothes, because he was getting ready to go to college that evening (T.348-49). He testified, "[W]hen I left from B-Floor the whistle blew shortly afterwards" (T.353).

To get to his class, Wise needed to check out at the Main Housing Unit gate by 6:00 p.m. (T.348-49). Wise did not recall whether he had an exam that day that he was concerned about being on time for, but he stated that there was an exam or test practically every day, and "I am always on time" (T.351). Wise testified to the following sequence of events: he left B-Floor (T.353); the 5:00 o'clock whistle blew (T.353); he went to change clothes (T.348,353); he had to wait in line for about ten minutes to get his clothes because they had a long line (T.353-54); he then returned to his cell (on G-Floor) to put the clothes on (T.354, see T.342-43); after which he went to A-Floor and stopped by the barber shop (T.348,354). At the barber shop, Larry Troy asked Wise for a cigarette (T.348, 354). Wise handed out a cigarette to Troy and one to another inmate who asked him for one; Wise then "left and went around to buy me another pack so I could

[10]Defense counsel's motion to strike this as speculation was granted (T.347-48).

go to college that night" (T.348). Wise testified that he did not have a watch on and could not say exactly what time it was when he went by the barber shop and saw Larry Troy. Asked whether he remembered saying in his deposition of February 8, 1983, that it was "somewhere around 5:30", Wise stated that he did not recall if he gave a definite exact time; "If I gave you that time, I cannot recall making it because I didn't have no watch on and there was no clock there for me to give you a time" (T.355). There was a clock by the office area at the Main Housing Unit gate, where Wise was to leave for college (T.352-53). When Wise first looked at that clock, it was five or ten minutes to 6:00; it was approximately 6:00 o'clock when he went out the gate (T.353). Wise also testified that before he went out the gate, somewhere between 5:45 and 6:00 o'clock, he saw the victim of the stabbing being brought through the court area on a stretcher (T.421).

On cross-examination, Frank Wise was asked about the 5:00 o'clock whistle he had referred to on direct (T.350). Wise replied that "[i]t's the big whistle in UCI and you can hear it all over the compound" (T.350). The whistle, Wise further explained, is "so you know what time to go to work and what time to get off from work" (T.350). Because he was not wearing a watch, Wise could not be positive how long he was on B-Floor; he believed it was around five minutes, give or take a few minutes (T.419). But he reaffirmed that that period of minutes on B-Floor was spent before the 5:00 o'clock whistle blew (T.350,419).

In addition, Wise testified that the clothing room opens at 5:00 o'clock, or sometimes a little after 5:00; "[b]ut it is supposed to open up at 5:00 o'clock" (T.350). At the time he was on B-Floor, Wise testified, the clothing room had not opened yet (T.351). When he went to pick up his clothing for college, it was after 5:00 (T.351).

Wise testified that he was standing directly in the doorway on B-Floor (T.357). In front of him was the "low side" hallway, which ran from Cell 1 all

the way to Cell-30 (T.357). While he was looking down the hallway, Wise was passed by two inmates, Singleton and Smith (T.358-59). Neither Singleton nor Smith stayed around for any length of time (T.358). Wise asked Singleton a question as he passed by; Singleton answered him and kept going down the hallway to his cell (T.358-59). Wise and Smith did not exchange any words; Smith just passed by Wise in the doorway "and he went on the high side to see somebody on the high side" (T.359). Once Smith turned the corner to the high side, Wise could no longer see him and neither could he see Wise (T.360).

Another inmate, by the name of Higgs, came by and went to Cell 5,6, or 7 on the low side to see a friend (T.361). According to Wise, both Singleton and Higgs went right by Cell B-3, where the noises were coming from, in order to get to where they were going (T.361). Singleton, Higgs, and Smith were the only people Wise saw, and they had already gone away by the time Wise saw Troy and Brown come out of the cell (T.363). Wise testified:

> MR. MAZAR: So they were not standing there with you at that time?
> FRANK WISE: They were not standing there with me, no.
> Q. If there had been anybody standing near that doorway, the B-Floor doorway, you would have seen them, is that correct?
> A. I believe I would have seen them if they had been standing there, yes.
> Q. But you didn't see anyone?
> A. No, I didn't see anyone. I wasn't keeping track like when Inmate Smith passed me. Once he passed me, that was it. The vision of him, my seeing him, is forgotten.

(T.363).

Wise was unwilling to say that it was impossible that someone else--unnoticed by Wise--could have been in a position to see what he saw (T.363-68). "...[I]f they had been standing off somewhere I might not have noticed them. But if they had been standing directly right there beside me in the doorway, I would have knowed that they was standing there" (T.364, see T.367). From where Wise was standing in the doorway, he had an unobstructed view of the low side hallway from Cell 1 to 30, and the stair landing area was also visible (T.371). He could

also see a little bit of the stairs (T.371). He could not see the "high side", but he could see the connecting hallway (T.372).

Wise testified that Singleton, Higgs, and Smith are all black inmates (T.372). Wise described Smith as "about 260 or 270 pounds, real dark skin", a "real big fat black dude...that works in the kitchen", with whom he (Wise) did not associate (T.373,427). Wise did not recall seeing anyone else in the area of B-Floor (T.372). He did not recognize the name Noel White, and did not recall seeing a tall inmate with a bushy beard and moustache (T.372-73). Wise reiterated that he could not say with absolute certainty that nobody else could have been in the vicinity (T.373-75). He would not eliminate the possibility that somebody could have peeked around the corner or walked by when he (Wise) moved up to peek into the cell (B-3) where the sounds were coming from[11]; "If I'm between Cells 2 and 3 and someone do not wish me to see them and they are standing behind the wall in the hallway, then I cannot see them. That's what I'm referring to" (T.374).

At the time he saw the inmates come out of the cell, Wise was not between Cells 2 and 3, but was standing in the doorway (T.375).

The day after the murder occurred, Frank Wise was locked up and read his Miranda rights (T.376). Inspector Sands told him he was under investigation for murder (T.376). About a week later, when he was interviewed by Sands, Wise stated that he had heard what he thought were homosexual beating sounds, but that he had nothing to do with it, and didn't know anything about who had done it (T.377). Wise testified that he told Sands the same thing he was saying at trial, with only one difference; that being the part about having seen the defendants come out of the cell (T.377-78, 381). He had lied about that part, Wise testified, in order to protect the two defendants (T.381).

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[11] As previously mentioned, Wise testified that he thought better of his curiosity and did not lift the blanket or peek into the cell, but rather backed up again to the doorway at the head of the steps (T.345).

Wise recalled that he gave a deposition, under oath (T.422), on February 8, 1983, in which he was asked if he saw Larry Troy on B-Floor at the time of the murder and he answered "No"[12] (T.382). Wise testified:

> That is the answer that I gave to you at that time for that deposition.
>
> But I also believe I took another deposition[13] approximately two or three weeks later, which was in February, and I gave a different statement.
>
> The one you are talking about, February 8, I did say that I did not see those two inmates. I lied on that deposition that you took on February 8.
> MR. MAZAR: You lied?
> FRANK WISE: I lied to still protect those inmates.

(T.383).

Wise claimed that when he gave the deposition on February 8, he explained to the attorneys at that time that he "did not want to give the deposition, because for me to give the deposition I would have to be lying in behalf of the Defendants, because I had lied when I gave the statement to Inspector Sands" (T.385, see T.383-84, 423-24). According to Wise, there was a stenographer present at the deposition, an older gentleman with a tape recorder, and he heard Frank Wise tell defense counsel that he didn't want to give a deposition because it would mean he would have to lie under oath (T.384-86, 423-24). Wise thought that the tape machine "was cut off one time. I don't remember exactly when" (T.385). But the stenographer was siting there and he heard the statement (T.385-86).

Wise testified that he had "some one-sided correspondence" with the defendants in this case; he wrote a couple of letters to which they did not reply (T.386-92; see R.359-62). In these unsolicited letters, written around December 1982 and

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[12]Similarly, Wise acknowledged that he stated under oath on February 8, 1983, that he never saw Willie Brown in the vicinity of Cell B-3 on the day of the murder (T.422-23).

[13]By this, Wise was apparently referring either to the unsworn statement he gave to state investigators around February 17, or the sworn tape-recorded statement given to the State Attorney's Office on March 3 (see T.393-96). The defense attorneys did depose Wise after he changed his testimony, but this did not occur until mid-April.

January 1983, Wise accused the defendants of slandering his name, and blamed them for failing to put a stop to rumors which Wise believed were circulating around the prison that he (Wise) was a snitch. In these letters, Wise indicated that he was willing--conditionally willing--at that point to testify for the defense, but that he might change his mind. The letters are vague as to what conditions or considerations might influence Wise's decision on how to testify (R.359-62).

Asked whether there came a time when he decided that he would testify for the state, Wise replied "Yes. I changed my testimony somewhere in the middle of February of this year" (T.392). He wrote to Lieutenant Lee or Inspector Sands, and they had a meeting on or about February 17 (T.393). At that time, Wise told the investigators that Troy and Brown came out of the cell, and he saw them (T.392). On March 3, he gave a sworn statement to the same effect (T.393-96).

Frank Wise testified that he has known Larry Troy since about 1970 (T.401, 404-05). He was asked "Is it your feeling, Mr. Wise, that you would want Mr. Troy to get the electric chair whether he is guilty or not?" (T.401). Wise answered "If he was innocent I wouldn't want him to get the chair...But I feel that he should have it because he is guilty of the crime" (T.402). Defense counsel, reading from page 19, line 12 of the February 8 deposition, asked Wise:

> Do you remember asking me the question--it might have been Mr. Salmon. But you asked the question of me, "Do you want to know how I really feel about them?" And Mr. Salmon indicates, "Yes," and then the witness, that's you, says, "I hope they get the chair. That is how I feel."
>
> And then do you recall I asked you this question, "Even though you don't know that they are guilty of anything."
>
> Your answer, "It doesn't make any difference."
>
> Do you recall those questions and those answers?

(T.402-03)

Wise answered "I don't recall. I can't say", and then, non-responsively, launched into another explanation of how he never wanted to give that deposition in the first place, and how he'd told the lawyers that (T.403).

Wise and Larry Troy are both from Miami (T.405). Wise testified that he and Troy were not close friends or associates (T.405); and that he (Wise) prefers to stay off by himself, and does not closely associate with anyone in the prison (T.405-06). Asked whether there had been bad blood between himself and Troy ever since he (Wise) killed Troy's cousin Hayward Williams, Wise replied "Mr. Haywood Williams is no kin to the Defendant Troy" (T.406).

The state's next witness was inmate Herman Watson.[14] Defense counsel, calling the court's attention to his previously filed motion to compel a psychiatric examination of Watson and/or to disqualify him as a witness (see R.374-76), requested the court to determine Watson's competency (T.431-32). After a brief colloquy, the trial court permitted Watson to testify (T.434).

In response to leading questions (T.434-37), Watson stated that on the afternoon of July 7, 1981, he had a conversation with Larry Troy about the death of a white inmate (T.437). This conversation took place, according to Watson, "on 3-T in UCI, the Rock, on 3-T outside" (T.437). Watson testified:

> He had told me like this here, like, me and a couple more dudes had went up there after they come to the kitchen and got me for Larry Troy, to ask me where he was.
>
> We went up there and they had some shoes and all.
>
> And after they left they had told me that he had just killed the Cracker, you know. And I asked him like this here, I say--

(T.437).

Asked if Troy told him anything else, Watson said "He had told me he might be going to jail, you know, he was looking to go to jail, you know, like that" (T.438).

Again in response to leading questions (T.439-40), this time concerning Willie Brown, Watson testified:

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[14]Any attempt to summarize Herman Watson's testimony (T.431-491) necessarily distorts it. It must be read in its entirety to be understood.

> MR. TOBIN [prosecutor]: Subsequent to that did you have occasion to see Mr. Brown on the compound when he was walking around the compound with Mr. Wise and you were alone and he was approached by Mr. Brown when he talked to you concerning the homicide on B-Floor?
> HERMAN WATSON: Yeah, he was talking to me. He told me he wanted me to hid at it, you know, what him and Wise, what was being said. You know, I told him I didn't want to hid it, you know, like that there. He kept on talking. You know, I was walking around the yard, you know. He kept on talking. I asked him, Frank Wise, you know, what he doing, you know, like that there. Frank Wise was telling him about he had---

(T.440).

According to Watson, Brown "had told me he wanted me to check with the bald head about did he get rid of the clothes and stuff. He told me that there" (T.441).

The prosecutor then asked Watson whether Brown made any statements about the homicide itself (T.442). Watson did not recall any such statements (T.442). The prosecutor asked the trial court to declare Watson an adverse witness; the court declined to do so (T.443-48). In the absence of the jury, the following took place:

> MR. TOBIN: The day the man died up on B-Floor were you on A-Floor in the barber shop?
> HERMAN WATSON: I had told you, like I work on A-Floor, right, as a houseman, right? And like I told you, you know, a lot of times I be right there in the barber shop, right? And like I stated, I can't really recall what I dealt, right? And I wasn't there at the time when that there happened. I told you that. On the 31st I told you that I wasn't right there, you know.
> If you just want me to say I was there, I wasn't right there. I done told you that.
> MR. TOBIN: I just want to know as best you can remember it today.
> THE COURT: Well, he says he doesn't remember.
> MR. SALMON [counsel for Brown]: But what he says, Your Honor, is--and I can have the court reporter read it back--he says he wasn't there.
> HERMAN WATSON: I be there all the time. But I can't say I was there when that there jumped off, right there. I stated that when I talked to him and the man, I talked to both of you all on the 31st.
> THE COURT: I understand what this man said better than both of you all.
> MR. TOBIN: Your Honor, I withdraw the proffer. I will not even ask the Court to declare him adverse.

(T.450-51).

On cross-examination, when asked about a sworn statement he gave to the prison investigators in July, 1982, Watson said "It was sworn, right. But just like I had told him, like, it was a lot of noise, right, I couldn't stand noise, right. It was a lot of noise and voices, you know" (T.458). Defense counsel asked Watson whether he had requested a transfer (T.458-60). Watson answered "When I seen him I said something about a transfer. And then that same day I seen him and I said something about the transfer I told him, no, man, let me stay where I was, right? I told him right there, right."

Watson testified that he had suffered an injury as a child; "I got a piece of lead that went in my head" (T.460). The noise and voices started happening in 1981 when he was at UCI (T.461):

> MR. MAZAR [defense counsel]: That's when it started happening?
> HERMAN WATSON: Yeah, a lot of noise. I couldn't stand noise, a lot of voices.
> Q. Voices, too?
> A. Yeah, a lot of voices, you know.
> Q. So you say you had that noise when you talked to Mr. Sands. Did you also have it when you talked to Mr. Lee?
> A. I didn't have it. It was a lot of noise, a lot of voices, right? You know, like loud, you know.
> Q. Noises and voices and noises?
> A. Uh-huh.
> Q. Does that effect you--Does it give you any pain or anything, this noise that you're talking about?
> A. No. I'm all right now. The doctor gave me a shot for it, you know.
> Q. He gave you a shot for it?
> A. Yeah, for the fracture.
> Q. For the fracture of the head?
> A. Yeah.

(T.461).

The noises, Watson testified, were not in his head; it was just a lot of noise around him, and it started in '81 (T.482). Sometimes the noises and voices get real bad, make his nerves bad (T.483). Defense counsel asked Watson whether the noises sometimes make him do things or say things (T.482-83, 485). Watson began talking about some letters he wrote to Larry Troy:

> And I told you I wrote the letters, that the letters, really I didn't supposed to write the letters because the voices had me writing the letters and Larry Troy was sending letters down to me.

(T.485).

Watson was asked whether it was the voices and the noises that had caused him to make the statements about Larry Troy in this case (T.487). He answered, "Well, I have to say there is a possibility it had something to do with it" (T.487). Watson did not know for sure if he had told the defense lawyers, when they came to visit him at FSP, that everything he had said in this case was because of the voices and noises (T.489-90, see 486-87). But he maintained that his testimony in court was the truth (T.487, 491).

The state's next scheduled witness was Claude Smith. Defense counsel objected to Smith's testimony on two separate grounds: (1) the witness' refusal to answer questions on deposition (T.491-96), and (2) the state's violation of the discovery rules, in failing to disclose the tape recorded statement made by the witness to Lieutenant Lee (T.496-98). [See p.3-8 of this brief.] As to the first ground for the objection, the trial court agreed with the prosecutor that the defense attorneys should have filed a motion to compel, and that their failure to do so precluded their objection (T.493-96, 498). As to the second ground for the objection, asserting a discovery violation, the prosecutor said this:

> Your Honor, what occurred was, as I was preparing for trial I noticed that the defense did not take any action with Mr. Smith. For that reason I asked Lieutenant Lee to talk to Mr. Smith again. He did that; I got the tape and I told them they could listen to the tape.
> MR. SALMON: Your Honor, the morning of trial.
> MR. MAZAR: This morning of trial, Judge. I mean--
> MR. TOBIN: I just got it the week before. I cannot give it to them until I can get a hold of it.

(T.497).

The prosecutor also opined that there is no difference between taking a tape recorded statement and just talking to a witness (T.497). Defense counsel disagreed, "If he took a taped statement we are entitled to see it. That's discovery.

Going to talk to or interview a witness is not discovery" (T.498).

Instead of addressing the discovery objection, the trial court returned to the subject of defense counsel's failure to file a motion to compel when Claude Smith refused to answer questions on deposition:

> I know good and well what the law is. Now, they're just the same, there never has been, and I don't know as there will be any death penalty case here. But if there is the competency of counsel is the first thing, the last thing, the middle thing that is being seized upon. And that would be true if Clarence Darrow was down here to try it.
>
> Until it is made into utter ridiculousness, a procedure of law, I think the Supreme Court is going to straighten that out next year. If they don't perhaps the Congress will.
>
> But I know, Mr. Tobin, that you are exactly right. They should have filed.
>
> And outside of this being a capital case I just absolutely have to tell you to go ahead and call your witness. And that's just too bad.
>
> But the fact is that I just don't believe that these lawyers are incompetent, although, they inadvertently overlooked doing that.

(T.498).

Without conducting any further inquiry, the trial court ruled that the prosecutor could call Claude Smith as a witness, but not until after the defense attorneys had an opportunity to listen to the tape (T.499-500). Therefore, four more brief witnesses were called by the state that afternoon, and Claude Smith was called first thing the next morning (T.535).

Smith testified that a few minutes after 5:00 p.m. on July 7, 1981, he was heading toward his cell on the high side of B-Floor (T.535-36, 540-41). He passed Frank Wise, who was standing by the doorway which was the entrance to B-Floor (T.536, 540-41, 546-47). As he started around to the high side, Smith heard hollering, so he turned around (T.536,541). "And by the time I got back two other inmates was coming out of the cell. They went downstairs. I went downstairs. They went into the shower area" (T.536).

Smith identified the defendants, Troy and Brown, as the individuals he saw (T.537). He did not know them by name, but he knew their faces, although

he had not seen them a lot (T.546, 552-53).

Claude Smith testified that, at the time he saw the two men come out of the cell, he (Smith) was standing about a foot away from Frank Wise (T.542, 546). There was a blanket over the door of the cell (T.543), but the only thing Smith saw Wise doing was leaning up against the big steel door (T.540-41, 546-47). Asked whether he saw Wise do anything else, Smith replied, "When I first turned around yeah, he waved his hand. That was all" (T.547).

Smith testified that he followed the two black males down the stairs into the shower area (T.536, 538, 543-44). Smith then started back upstairs, where he encountered the white inmate who had been stabbed trying to make his way downstairs to the hospital (T.538, 544-46). Smith said he helped the white man walk down to the bench; after that the stretcher bearers came and took him to the hospital (T.538, 544-46). Smith physically helped the victim down the steps, but he did not get any blood on himself until afterwards, when he backed up and touched the railing (T.544-45). He did not know how long it took him to get down the steps (T.545).

According to Smith, after he and the officers got the victim to the bench (T.538, 544), he (Smith) "went and told Sergeant Blum that the two guys he was looking for had ran up in the shower area" (T.538).

On cross-examination, Smith was asked:

> Isn't it true, Mr. Smith, that you went up on B-Floor at 4:00 o'clock, not 5:00 o'clock?
> CLAUDE SMITH: I went up at 4:00 o'clock and then I went up at 5:00 o'clock.
> MR. SALMON: Isn't it true, Mr. Smith, that you only went up on B-Floor at 4:00 o'clock, that that is what you told Lieutenant Lee on the tape?
> CLAUDE SMITH: I might have had the time wrong.

(T.552).

On re-direct, Smith testified that he was not wearing a watch that day, but whatever time he was on the floor, that was when the incidents happened (T.556). On re-cross, he was asked:

> MR. SALMON: Isn't it true, Mr. Smith, that the time you were up there when you saw this it was 4:00 o'clock?
> CLAUDE SMITH: I can't say exactly the time.
> MR. SALMON: Isn't it true that that is what you told Lieutenant Lee?
> CLAUDE SMITH: I was just guessing at the time then.
> MR. SALMON: 4:00 o'clock?
> CLAUDE SMITH: I was guessing at the time because it was just about 5 or 10 minutes--I can't say exactly how long they had been into the evening meal.

(T.557).

Mitchell Anderson, a correctional officer, testified, over defense objection on relevancy grounds (T.501-04), that on the morning after the stabbing incident, he and the rest of the "inside security squad" were assigned to search different areas "to look for weapons or anything...that might come up with bloodstains or anything on it" (T.505-06). Anderson was on the athletic yard, or "rock yard", and he ran across a bucket, which contained an "inmate's shirt and towel and stuff", which had been partially burned (T.506). Anderson did not know who put the bucket in the yard, or how it got there, or when it was put there (T.509-10). He surmised that it would probably have only been there for a few days at the most, "because you have clean-up crews out there who usually clean stuff up" (T.509). Anderson had no personal knowledge as to when or whether such clean-up had actually been done. (T.510). That same afternoon, Anderson was asked by an investigator to go to Cell 10 on F-Floor and "confiscate the shoes and stuff that was in the cell" (T.508). Anderson did not remember what inmate was in that cell (T.508). The shoes were turned over to correctional officer Weiland (T.508).

Donald Conner, laundry manager at UCI, testified, over defense objection (T.512-13), that his records showed that as of August 3, 1981, inmate Willie Brown, #022323, was missing a set of clothes (T.511-13). On cross-examination, Conner acknowledged that it is hard to keep track of inmate clothing, and that clothing is lost, stolen, or misplaced at the prison every day in any number of different ways (T.514). Conner supervises some inmate workers, who do some of the "running around" (T.516). Conner never had any personal knowledge as to whether Willie Brown was missing any clothing (T.515-16).

Correctional officer I.O. Blum was on duty, as supervisor of the Main Housing Unit, on the afternoon of July 7, 1981 (T.520). Toward the end of the evening meal, Sergeant Blum came out of the mess hall and walked into the office (T.520). He testified:

> And I was standing, looking out the west windows of the office when an inmate came through, it would be the east grille court gates. He was all red. It looked like somebody had dumped a bucket of paint over him.
>
> He walked down and sat on a bench in front of the office at the same time as I rushed out of the office, because I had noticed he had been wounded.
>
> So I got runners and an officer that was working the east exit door of the chow hall to escort this inmate to the hospital on a stretcher.

(T.520-21).

When Sergeant Blum got closer to the injured inmate, he could see that the red liquid, which looked like somebody had dumped a bucket of paint, was blood (T.521). The prosecutor asked:

> After getting the inmate and getting him to the medical aid, did you make an attempt to ascertain where he came from?
> SERGEANT BLUM: Yes, sir. I stepped into the office for a split second and told the clerk, I said, "Send me an officer with the keys for the east side."
>
> Then I followed a trail of blood up on the second floor, which is known as B-Floor.
>
> On the west side of B-Floor it went down to the third cell, I believe, on the west side of B-Floor. That's where the blood stopped.

(T.521).

According to the incident report filed by Sergeant Blum, the approximate time of the above-described event was 5:45 p.m. (T.522-23). Blum testified that he tried to be as accurate as possible in the report (T.523). He testified that the mess hall closes at approximately 5:45, and the incident occurred toward the end of the evening meal, so it was between 5:30 and 5:45 (T.523).

When Sergeant Blum spotted the injured inmate, he got the first officer he could get to take the man to the clinic on a three-wheel pushcart stretcher (T.524-26). The clinic was 100-150 yards away (T.524). From the time Sergeant Blum first saw the injured inmate, until the time the latter was on his way to

the clinic on the stretcher, not more than a couple of minutes had passed (T.525). Blum did not know how long it actually took to get to the clinic once the victim was placed on the pushcart, because he did not escort him (T.524). Instead, Blum immediately went in the other direction--upstairs to B-Floor--following the trail of blood (T.521-24).

In his testimony, Sergeant Blum made no mention of Claude Smith, or of seeing any heavy black inmate assisting the injured white inmate down the stairs or to the bench (T.519-26).

Stephen Platt, a serologist with the FDLE, examined the shirt which had been in the bucket found by Mitchell Anderson on the rock yard, for the presence of bloodstains (T.564-65). He found that bloodstaining was present and that it was of human origin, but further testing was inconclusive (T.565-55). One factor which affected the testing was that there were charred and scorched areas on the shirt (T.566-67). According to Platt, blood and biological fluids are very susceptible to damage by heat, and this will destroy the ability to determine blood type from a blood stain (T.567). Platt also examined the tennis shoes which were confiscated by Mitchell Anderson from Cell F-10 (T.569-70). He found "dilute bloodstaining" on the tennis shoes; additional testing was inconclusive (T.570). It appeared to Platt that the bloodstaining was diluted with water (T.570). This, he testified, would be consistent with somebody attempting to wash out the blood stains (T.570).

Lieutenant R. T. Lee, institutional investigator for Union Correctional Institution, took photographs of the crime scene on the evening of the homicide (T.575-79, 583-85). Lieutenant Lee was one of the first persons notified that an individual with multiple stab wounds (later identified to him as Earl Owens) was at the clinic (T.586). He received this information between 5:40 and 5:45 p.m. (T.586). Lee testified that in this type of situation, under normal procedures, he would be contacted quickly; usually within the first three minutes of when the inmate was started on his way to the clinic (T.590-91). About a minute after being

notified of the incident, Lieutenant Lee spoke with Owens at the clinic (T.587). Owens was able to communicate understandably (T.587).

Additional crime scene photographs were introduced through the testimony of D.L. Cochran of the Union County Sheriff's office (T.598-602). On both direct and cross, Cochran was asked about two photographs previously entered as Defendant Troy's Exhibits 2 and 3 (T.600, 602-03, see T.583-85). Exhibit 3 was a photograph taken by Cochran inside Cell B-3 (T.602, see T.585). In the photograph, Cochran testified, there "appeared to be footprints from a tennis shoe or athletic-type shoe"[15] (T.602). Cochran stated that the photograph accurately represented what he saw (T.603).

Roy Weiland, a correctional officer and (at the time of the incident) relief investigator, was in Lieutenant Lee's office when the call came through about the injured inmate at the clinic (T.605). Weiland looked at his watch to verify the time the call was received; as best he could recall, it was 5:45 p.m. (T.614). Weiland accompanied Lieutenant Lee to the clinic (T.605). There, he spoke with Earl Owens (T.606). Owens was saying repeatedly that he was dying, and that he couldn't breathe (T.606). In between those statements, Weiland asked him questions about the stabbing (T.606). Owens told him "Two blacks stabbed me. One tall and slender, one short and slender" (T.606-07). [On deposition, Sergeant Weiland had said that the victim had described his assailants as "two niggers"(T.615-16). Weiland explained that he had been unprepared for the deposition; he had since reviewed his notes and the correct statement was "two blacks" (T.615-16)]. Owens could not say what color clothes they had on (T.616). According to Weiland, Owens told him that the stabbing occurred in Cell B-3 of the Rock (T.617). He was able to relate that he had made his way from the cell to the bench in front of the Main Housing Unit office (T.617). Weiland asked Owens where the assailants worked

[15]In his closing argument, defense counsel asked the jury to compare the tennis shoes seized by Mitchell Anderson with the tread marks in the photograph, and asserted that they did not match (T.835-36).

(T.617). Owens was unable to say where they worked because he apparently did not know (T.617).

As assistant to the investigator, Sergeant Weiland had occasion to order correctional officer Mitchell Anderson to go get some shoes out of Cell F-10 (T. 607). One of the inmates in that cell was Willie Brown (T.607). There was also another inmate in that cell (T.607).

Weiland was not present at the site where Mitchell Anderson found some charred clothing in a bucket, but he was subsequently made aware of it (T.609). The name W. Brown was on the shirt (see T.501-03, 563-65, 824). In July of 1981, there were four W. Browns at UCI (T.609). Sergeant Weiland interviewed three of the four W. Browns (all except the defendant Willie Brown) and determined that each of these inmates had his clothing "with full uniform assembly" (T.610). Over defense counsel's objection that there was no predicate, no authentication, and no relevancy shown, the state was permitted to introduce the bucket and its contents into evidence (T.610-13).

Before announcing rest, the state recalled Mitchell Anderson, who now testified that he obtained the tennis shoes from Cell F-10 from Willie Brown (T.625-26). On cross-examination, he stated that the shoes were not taken off anybody's feet, or from anyone's physical possession; he believed they just took them out from under the bed (T.626-27).

At the close of the state's case, Troy and Brown moved for judgment of acquittal, which was denied (T.632-43).

The first defense witness was William Thompson, a court reporter. On February 8, 1983 at Florida State Prison, Thompson was present, in his capacity as court reporter, at the deposition of Frank Wise (T.649). Thompson and Daniel Mazar (Larry Troy's attorney) were in each other's presence at all times; Mazar was never alone with Wise (T.649). Under Thompson's normal procedure in taking a deposition, he is the one who brings the witness into the room and introduces him to the attorneys, and then immediately goes on the record, taking down every-

thing that is said in the room (T.650). At no time, before or during the deposition, did Frank Wise make any statement that he did not want to give a deposition and that he was going to lie if he gave a deposition (T.650).

Thompson read an excerpt from page 19 of Frank Wise's February 8, 1983 deposition:

> THE WITNESS: Do you want to know how I really feel about them?
> MR. SALMON: Yes.
> THE WITNESS: I hope they get the chair. That's how I feel.
> MR. MAZAR: Even though you don't know that they are guilty of anything?
> THE WITNESS: It doesn't make any difference.

(T.651).

Thompson also read, from page 42 of the same deposition:

> ANSWER: Scuffy Ray was in the barber shop.
> QUESTION: At what time are you talking about?
> ANSWER: I can't [give] you no specific time. All I know is it was somewhere around 5:30.
> Q. Thank you.

(T.651-52).

Before the deposition began, and in accordance with his standard procedure, Thompson administered an oath to Frank Wise to tell the truth and nothing but the truth (T.652).

Lieutenant R.T. Lee, recalled to the stand as a defense witness, testified that evening "chow" ran from 4:30 p.m. until "however long after 5:30 it would take to get the last group of inmates fed" (T.653). During this period of time, the cells are open, and inmates have access to the various floors and buildings (T.653-54). Lieutenant Lee gave testimony regarding the physical structure and layout of the Main Housing Unit (T.662-71).

Lieutenant Lee interviewed Frank Wise on February 17, 1983, and took a taped statement from Wise on March 3 of that year (T.655-58). In the earlier conversation, Wise had initially maintained that he was on the floor, but had no knowledge of the murder or the people involved (T.657). Afterwards, Lieutenant Lee told Wise "in no uncertain terms" that he (Lee) did not believe Wise's state-

ment, based upon what he had been told by other witnesses (T.657). Thereupon, a "secondary conversation" ensued in which Wise claimed to have seen the defendants, Troy and Brown, come out of the cell that day (T.675). Lee was also involved in taking statements from Herman Watson on July 26, 1982 and August 13, 1982 (T.659-62). Lee recalled that, on both occasions, Watson stated that he wanted a transfer (T.660-61).

Lieutenant Lee testified that he took a statement from Earl Owens on his deathbed (T.672). Defense counsel asked:

> In that statement, did he give you a time that the stabbing occurred?
> LT. LEE: Yes, sir, he did.
> Q. What time was that?
> A. He said it was approximately 5:30.

(T.672).

Lieutenant Lee spoke with Claude Smith early in the investigation; to the best of his recollection on the very evening of the murder (T.672). Claude Smith told Lieutenant Lee, at that time, that as he was leaving B-Floor, he heard screams (T.674). Smith observed a blanket draped over Cell B-3, and saw Frank Wise standing in the corner where he would be able to observe both the "low side" hallway containing B-3 and the short connecting hallway leading to the other side of B-Floor (T.674). As Smith was exiting the floor, he observed Frank Wise go down and lift the blanket and look into the cell (T.674).

Eric Fisher, a licensed private investigator, interviewed Herman Watson at Florida State Prison on January 20, 1983 (T.680-81). Attorney Bill Salmon (counsel for Willie Brown) was also present (T.681). Herman Watson told Fisher that his head was full of noises and he heard voices and they made him tell lies (T.685). Watson said that everything he told Mr. Sands was a lie (T.685).

On cross-examination, Fisher testified that he was hired by defense counsel to assist them in preparing the case, though his fee would be paid through the Court (T.690). Fisher, who has his own independent investigation firm, had never worked for Mr. Mazar before, and had only worked for Mr. Salmon a few times

previously (T.692). Fisher did not tape record his interview with Watson, but he took notes during the conversation (T.689-90).

Noel White, a prison inmate from the South Carolina Correctional Institution, was an inmate at UCI on July 7, 1981 (T.693). He was housed on B-Floor of the Main Housing Unit, in Cell B-14 (T.693). Late on that afternoon, between 5:15 and 5:30, White twice passed by Cell 3 (T.694-95).[16] There was a blanket over the door (T.694). White heard noises which sounded to him like somebody was getting stabbed (T.694). The second time White passed by, he saw two black males leaving the cell, one of whom had a knife in his hand (T.695). Shortly thereafter, a white inmate who was known as Fat Boy fell out of his cell (T.696-98, 700). According to White, "blood was jumping out of everywhere" (T.696). The injured inmate started down the hall toward the staircase (T.696-98). White wanted to help him but felt he couldn't; "He was stabbed pretty bad, man. If I had tried to help him and he died, then I would be charged with this" (T.698-99). White watched the injured man go all the way to the bottom of the stairs, to the grille gate that leads to the courtyard area (T.699). It could have taken the man as long as five minutes to get down the stairs, because he was stumbling and grabbing on to the bannister (T.699). When he got toward the bottom of the steps, he fell (T.699).

White testified that he did not know and would not recognize the two black men he saw come out of the cell (T.700). White knows the defendants Troy and Brown, not by their given names, but as Scuffy Ray (Troy) and Bama (Brown) (T.700). White used to see them frequently in the dining room, and he knows them when he see them (T.700). The two men who came out of the cell were not Troy or Brown (T.695, 700).

White testified that there was nobody with him standing by the door when the two men came out of the cell (T.697). White testified that he knows Frank Wise

[16]White initially testified that it was Cell 4; then stated it was Cell 3 (T.694).

and Claude Smith, and that neither of those individuals was there when the people came out of the cell (T.697).

On cross-examination, the prosecutor asked White if he recalled talking to Lieutenant Larry Cochran on Monday morning at the Union County Jail, and telling Cochran that he had told Mr. Tobin [the prosecutor] on Sunday morning that Troy and Brown were the individuals that came out of the cell (T.701-06). White answered "No, sir, that is not what I told you" (T.706). The prosecutor asked White if he had a conversation with Cochran the preceding Friday, in which he identified Troy and Brown (T.706). White acknowledged having a conversation with Cochran on that date, but denied having identified the defendants (T.706). The prosecutor asked White if he recalled having a conversation with the prison investigators Sands and Lee on February 1, 1982, and if he recalled identifying the defendants at that time (T.706-07). White replied that Inspector Sands showed him two pictures, and told him that these were the two men charged with it, and that he (White) was supposed to say that they were the ones who did it (T.707). Sands did not show White a whole set of pictures, just two (T.707).

The prosecutor asked White whether, in his conversation with Lt. Cochran on Monday, he had said that he had told Mr. Tobin on Sunday that the state wasn't "going to get nothing for nothing", and if they (the state) wanted his testimony they would have to get him out of the South Carolina Prison (T.709-10). White replied "No, that is not what I told him" (T.710). The prosecutor asked White whether "Mr. Mazar and/or his compatriot" had been up to see him during the week, and whether Mr. Mazar had brought him cigarettes on Tuesday (T.711). After the defense's objection to this question was overruled, White told the prosecutor, "Yes, that's right. They brought me some cigarettes, but they ain't asked me about how many packs of cigarettes you sent me" (T.712).

On re-direct, White was asked by defense attorney Mazar about the time Mr. Mazar had come to the South Carolina prison to talk to him (T.712-14). At that time, White told Mazar that Bama and Scuffy Ray were charged with a murder

they didn't commit (T.714). He told Mazar that Sands and Lee had interrogated everybody that lived on B-Floor, and that they knew that he (White) had a detainer from South Carolina (T.714). When first questioned about the murder, White told Sands and Lee the same thing he testified to in court (T.714). They said they would be back to see him (T.714). When they came back, they showed him the pictures of the two defendants; Sands then told White "that I only had thirty-one months left on the South Carolina sentence and . . . if I would come to court and testify against these two convicts that he would put me on the street without a parole" (T.714-15). White understood this to mean that in exchange for his testimony in court, the state would arrange for him to be kept within the Florida system, and he would not have to serve any time in South Carolina (T.715).

White testified that, contrary to what he thought he had bargained for, he was sent back to South Carolina on December 21 (T.715, see T.693). Larry Cochran of the Sheriff's office was the person who brought White to Florida for the trial. White testified:

> Mr. Cochran reminded me that I was supposed to be a State's witness and that he wanted to know if I was going to--if I was still going to go along with the deal that had been brought to me previous to coming back down here. And I told him at that time that they brought me down here from South Carolina and that I had felt that it wasn't right for me to get up here and say that those two were the ones that I had seen stab that boy when they are not the ones.

(T.716).

According to White, he saw representatives of the State Attorney's office and officers from the D.O.C. and the Sheriff's Department every day since he'd been returned to Florida (T.719-20). After White talked with the defense attorneys on Thursday, the officers pulled him out that night and wanted to know what had been discussed (T.720). On Saturday evening around 6:30, White testified, he was threatened and roughed up by Larry Cochran and three other officers (T.720-25, 728).

White testified that none of the three defense attorneys ever promised him anything in exchange for his testimony, nor did they lead him to believe that they could do anything to get him out of prison (T.719). None of the three defense attorneys ever suggested to him what his testimony should be (T.719).

Private investigator Eric Fisher was recalled to the stand, and testified that he participated in the interview of Noel White in South Carolina (T.731). Neither Fisher nor defense attorney Mazar made any suggestion to White as to what he ought to say during the trial, nor did they promise him anything for his testimony (T.731).

Franklin Kelly, a prison inmate who was housed on G-Floor of UCI on July 7, 1981, testified that he saw Larry Troy in the barber shop around 4:00 p.m. on that day (T.732-33). At about five minutes to 5:00, Kelly, Troy, and another fellow named Sharp, went to early chow (T.733). They were in the chow hall for pretty close to an hour (T.733). As he and Troy were coming out of the chow hall, Kelly saw blood on the bench and the wall to his left, and he said to Troy that something had happened (T.734). Somebody who was standing by the stairway said that some guy had gotten stabbed on one of the floors upstairs (T.734).

On cross-examination, Kelly was asked whether he had contacted any of the prison investigators and told them that Troy was with him, after he learned that Troy had been locked up for the crime (T.734-38). Kelly stated that it was not until a month or two after the incident that he found out that Troy had been locked up (T.735-37), but he acknowledged that he did not contact any prison officials at that time (T.738). Kelly did tell Troy's defense counsel, and his deposition was taken by the assistant state attorney on May 5, 1983 (T.735).

John Allen,[17] an inmate who was housed on H-Floor, UCI, on July 7, 1981, testified that he was acquainted with both Larry Troy and Earl Owens (T.739). Allen knew Owens well enough to consider him a friend; they used to talk together and exercise together (T.739-40). Around noon on July 7, 1981, Allen and Owens

[17]The testimony of John Allen is particularly significant with regard to Issue III, supra, which concerns appellants' petition for writ of error coram nobis.

went to the barber shop (T.740-41). Allen was having his hair lined up in the back, and he had a conversation with the barber, Scuffy Ray (Larry Troy) (T.741). Allen was doing most of the talking; Earl Owens and Troy may have exchanged a couple of words at the most (T.741). According to Allen, Owens had been to that barber shop on several prior occasions, and had his hair cut by Larry Troy (T.741). Allen did not think Owens would have known Troy by his given name, but he definitely would have known him as Scuffy Ray (T.742).

On cross-examination, Allen testified that he does not know anyone named Willie Brown (T.744).

Adrian Howard, an inmate who was housed in the Southwest Unit at UCI on July 7, 1981, testified that he saw Frank Wise in his (Wise's) cell in the Main Housing Unit during the late afternoon on that date (T.747). It was before dinner, around 5:00 o'clock (T.747). Howard wanted to get something to smoke (i.e., reefer), and had been told that Wise had some (T.747, 757). Howard and Wise, along with "a guy named Chapman, and Lion and another guy named Fast" were in the cell, "rapping" and drinking and smoking (T.748). Howard stayed in the cell for 25 minutes to half an hour, and then left with Chapman (T.748). When he left, Frank Wise remained in the cell (T.748). Howard testified that since he is housed in the Southwest Unit, he was outside his regular area (T.749). This is a violation of the rules, but it happens every day (T.749).[18]

On cross-examination, Howard was asked whether the proper procedure when an inmate leaves the Southwest Unit to go to another area in the prison is to sign out (T.753-54). Howard acknowledged that that is the proper procedure, and that he did not follow it (T.753-54). Howard testified that chow had not yet begun at the time he made it over to the Main Housing Unit (T.756). In response to the prosecutor's question, Howard stated that chow does not always start at exactly 4:30 (T.756).

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[18]Defense counsel asked Howard if he knew of any bad blood between Frank Wise and Larry Troy (T.750). Howard answered "Well, I knew his cousin. He had a cousin that got killed by the guy. I guess they had a little bad feelings between the two of them" (T.750). The state's objection to this testimony and motion to strike were granted by the trial court (T.750).

Howard was asked what floor Frank Wise's cell is on, where they were drinking wine and smoking reefer (T.756). He answered that it was G-Floor (T.757). The prosecutor asked Howard if he remembered giving a deposition in which he said Wise's cell was on B-Floor (T.757). Howard replied "I can remember saying G-Floor. G and B sound alike. It could have been misheard. I said G-Floor" (T.757).[19] On re-direct, Howard reiterated that it was on G-Floor that he drank wine with Frank Wise (T.758).

Michael Madry, an inmate housed on D-Floor, UCI, on July 7, 1981, testified that he saw an inmate who was "bleeding real bad" coming down the stairs (T.761-62). The injured inmate was "just wobbling, you know, trying to get to the office or something"; he made it to the bottom of the stairs and went to the outside court, where an officer rushed him over to the outpatient clinic (T.762-63). At the same time Madry saw the man coming down the stairs, he saw Willie Brown and Leon Williams "coming out the chow hall area like, you know, like coming from out in the yard like..." (T.761).

On cross-examination, Madry stated that Brown was coming from the east gate, "just like coming off the Rock yard" (T.764). "The chow hall is to the east gate. You do have to go out the chow hall and then go on the yard and then the officer opens up the gate and then everybody comes through the east gate" (T.764). If somebody had been in the showers on the second floor, and came down the stairs and through the east gate, they would be coming in the same direction as the inmates exiting the chow hall (T.764-68). It appeared to Madry that Brown and Leon Williams "had came from off the yard, from eating, you know" (T.770).

The defense rested (T.771). The state recalled D. L. Cochran of the Union County Sheriff's office as a rebuttal witness. Cochran testified that he had occasion to speak with Noel White on Friday of the preceeding week and on the following

[19] According to the trial transcript, Howard said B-Floor in his testimony on direct (T.747). Whether that is what he said or whether the court reporter heard it wrong is uncertain. However, the prosecutor asked him only about the deposition, and did not bring up any discrepancy in this regard in his trial testimony.

Monday (T.790-91). According to Cochran, in the Friday conversation White had identified the defendants Troy and Brown as the two individuals who had come out of the cell (T.791). In the Monday conversation, Cochran testified, White told him that he had said the same thing (i.e., identified the defendants) to Mr. Tobin, the prosecutor, on Sunday (T.791-92). Cochran further testified that White told him that he (White) had advised Mr. Tobin that unless the prosecutor made a deal with him regarding his immediate release from prison on parole after he returned to South Carolina, he was going to lie on the stand and say that the defendants were nowhere in the vicinity at the time the crime was committed (T.792). Cochran stated that he did not pull Noel White's hair or twist his arm on Saturday night at approximately 6:30 (T.793). At that time, Cochran testified, he was in Gainesville visiting his wife in the hospital (T.793).

D.O.C. inspector H. Edward Sands testified that when he interviewed Noel White on February 1, 1982, he showed White an entire photo lineup and not just two photographs (T.799-800). Sands stated that he did not suggest to White who he should pick out (T.800-01). According to Sands, White picked out the photographs of Troy and Brown (T.801-02).

Roy Weiland was recalled, and testified that as part of his duties he has been the main housing unit sergeant.[20] The officer serving in that capacity is in charge of feeding the inmates in that unit (T.803). Weiland testified that, in July 1981, feeding started at approximately 4:30 or 4:45 (T.804-05).

Weiland was not in the chow hall when feeding began on July 7, 1981 (T.805-06). Weiland was notified of the stabbing incident at approximatley 5:45, and he was at the outpatient clinic with Earl Owens until approximately 6:00 o'clock (T.806-07). According to Weiland, chow was still going on during the investigation, and at 6:00 (T.806-07).

The defense's renewed motion for judgment of acquittal was denied (T.808).

[20]Weiland was not acting on the capacity of main housing unit sergeant on the late afternoon of July 7, 1981 (T.805-06); but was working as a Correctional Officer I, Relief Investigator (T.604-05). Sergeant I.O. Blum was supervisor of the main housing unit at the time this incident occurred (T.520).

IV SUMMARY OF ARGUMENT

The prosecutor's failure to disclose the tape-recorded statement of Claude Smith was a violation of the discovery rules. Defense counsel objected and asked to exclude Smith as a witness. The trial court permitted Smith to testify without conducting a Richardson inquiry. This was per se reversible error. [Issue I]

The state's evidence of appellants' guilt was self-contradictory. The testimony presented in the state's case itself conclusively shows that at least one of the state's two key witnesses gave perjured testimony, and comes very close to conclusively showing that both of these two witnesses perjured themselves. There is an absence of "competent, substantial evidence" to support the verdict and judgment, and appellants' conviction and death sentence should be reversed. In the alternative, appellant requests the relief set forth at p.72-74 of this brief. [Issue II]

A new trial should also be granted on the basis of prejudicial acts of jury misconduct in both the guilt and penalty phase deliberations [Issue III], on the basis of the trial court's behavior toward the defense attorneys throughout the course of the trial [Issue IV], and in the interest of justice [see Issue II, p.72-73].

V ARGUMENT

ISSUE I

THE TRIAL COURT ERRED IN FAILING TO CONDUCT A RICHARDSON INQUIRY INTO THE STATE'S VIOLATION OF THE DISCOVERY RULES.

[The facts and circumstances giving rise to this point on appeal are set forth at pages 3-8 and 20-21 of this brief, and, in the interest of brevity, will not be repeated here.]

In Alfaro v. State, 471 So.2d 1345 (Fla. 4th DCA 1985), the appellate court reversed a manslaughter conviction, where the state failed to meet its continuing obligation to furnish discovery, and the trial court failed to conduct an adequate Richardson inquiry into the circumstances and possible prejudicial effects of the state's violation of the discovery rules. In Alfaro, the county medical examiner had been listed as a witness; the defense had his report and deposition which indicated the results of several autopsies and blood alcohol tests. Shortly before trial, without notifying the defense, the state had the examiner do an accident reconstruction evaluation, which pinpointed the defendant as the driver of the vehicle which caused the accident. At trial, over defense objection, the medical examiner was allowed to give expert testimony on that issue, even though the state had failed to disclose this evidence before trial. On appeal, the District Court noted that "Richardson v. State, 246 So.2d 771 (Fla. 1971), strictly requires the trial court to conduct a mini-hearing at trial if a discovery violation is alleged and to determine what sanction, if any, including possible exclusion of the evidence or mistrial, may be appropriate." The Court further observed that in the case before it "[t]he state was not called upon [in the trial court] to explain its failure to disclose the expert's new opinion evidence or to otherwise carry its Richardson-mandated burden of demonstrating no prejudice to the defense."

> This scenario offers the perfect example of why the Florida Supreme Court adopted the rule of Richardson: The defense

> is suddenly faced with critical evidence to which it has little or no opportunity to respond. This is contrary to the entire scheme of Florida's criminal discovery rules which seek to enforce the defendant's due process right to know in advance the nature of the charges and the evidence against him.
>
> The Florida Supreme Court has held, of course, that the district courts have no discretion and must order new trials under such circumstances without regard to the harmless error rule. Cumbie v. State, 345 So.2d 1061 (Fla. 1977). Because of the critical nature of the evidence in question, we could hardly apply the harmless error rule to the facts of this case, even if we were authorized to do so.

Alfaro v. State, supra, at 1346.

See also Donahue v. State, 464 So.2d 609, 611 (Fla. 4th DCA 1985) (the ultimate purpose of Florida's criminal discovery rule is to ensure a fair trial by preventing "the use of surprise, trickery, bluff and legal gymnastics"); Raffone v. State, 483 So.2d 761, 763 (Fla. 4th DCA 1986); cf. Dodson v. Persell, 390 So.2d 704, 707 (Fla. 1980).

In the present appeal, as is typical of cases involving Richardson error, the issue breaks down into three separate questions. (1) Did the state commit a discovery violation? (2) If so, did the defense raise an objection based on the discovery violation, thereby triggering the trial court's obligation to conduct a Richardson inquiry? (3) If so, did the trial court conduct an adequate Richardson inquiry? If the answer to the first two questions is Yes, and the answer to the third question is No, the appellate court is obligated to reverse the defendant's conviction for

a new trial.[21] Appellant will discuss these three questions in sequence.

First, did the state commit a discovery violation?

Florida Rule of Criminal Procedure 3.220(a), sets forth the prosecutor's obligation under the rules of reciprocal discovery. The tape recorded statement of Claude Smith was obtained by Lieutenant Lee (who, in turn, was interviewing Smith at the direction of Assistant State Attorney Tobin). The taped statement was clearly discoverable material under subsection (a)(1)(ii) of the rule, which states:

> Rule 3.220. Discovery
> (a) Prosecutor's Obligation.
> (1) After the filing of the indictment or information, within fifteen days after written demand by the defendant, the prosecutor shall disclose to defense counsel and permit him to inspect, copy, test and photograph, the following information and material within the State's possession or control:
>
> (i) The names and addresses of all persons known to the prosecutor to have information which may be relevant to the offense charged, and to any defense with respect thereto.
>
> (ii) The statement of any person whose name is furnished in compliance with the preceding paragraph. The term "statement" as used herein means a written statement made by said person

[21] See e.g. Smith v. State, ___ So.2d ___ (Fla. 1986) (Case Nos. 67,772 and 67,773, opinion filed December 24, 1986); Kilpatrick v. State, 376 So.2d 386 (Fla. 1979); Wilcox v. State, 367 So.2d 1020 (Fla. 1979); Cumbie v. State, 345 So.2d 1061 (Fla. 1977); Richardson v. State, 246 So.2d 771 (Fla. 1971); Waters v. State, 486 So.2d 614 (Fla. 5th DCA 1986); Raffone v. State, 483 So.2d 761 (Fla. 4th DCA 1986); Gant v. State, 477 So.2d 17 (Fla. 3d DCA 1985); Griffis v. State, 472 So.2d 834 (Fla. 1st DCA 1985); Wortman v. State, 472 So.2d 762 (Fla. 5th DCA 1985); Alfaro v. State, 471 So.2d 1345 (Fla. 4th DCA 1985); Donahue v. State, 464 So.2d 609 (Fla. 4th DCA 1985); Balboa v. State, 446 So.2d 1134 (Fla. 3d DCA 1984); McCollough v. State, 443 So.2d 174 (Fla. 1st DCA 1983); Poe v. State, 431 So.2d 266 (Fla. 5th DCA 1983); Haversham v. State, 427 So.2d 400 (Fla. 4th DCA 1983); Clair v. State, 406 So.2d 109 (Fla. 5th DCA 1981); Hill v. State, 406 So.2d 80 (Fla. 2d DCA 1981); Wendell v. State, 404 So.2d 1167 (Fla. 1st DCA 1981); Miller v. State, 403 So.2d 619 (Fla. 1st DCA 1981); McDonnough v. State, 402 So.2d 1233 (Fla. 5th DCA 1981); Hutchinson v. State, 397 So.2d 1001 (Fla. 1st DCA 1981); Witmer v. State, 394 So.2d 1096 (Fla. 1st DCA 1981); Brey v. State, 382 So.2d 395 (Fla. 4th DCA 1980); Boynton v. State, 378 So.2d 1309 (Fla. 1st DCA 1980); Neimeyer v. State, 378 So.2d 818 (Fla. 2d DCA 1979); Jones v. State, 376 So.2d 437 (Fla. 1st DCA 1979); Waters v. State, 369 So.2d 979 (Fla. 3d DCA 1979); McClellan v. State, 359 So.2d 869 (Fla. 1st DCA 1978); Lavigne v. State, 349 So.2d 178 (Fla. 1st DCA 1977); Johnson v. State, 312 So.2d 231 (Fla. 2d DCA 1975); Kelly v. State, 311 So.2d 124 (Fla. 3d DCA 1975); Carnivale v. State, 271 So.2d 793 (Fla. 3d DCA 1973); Salamone v. State, 247 So.2d 780 (Fla. 3d DCA 1971).

> and signed or otherwise adopted or approved by him, or a stenographic, mechanical, electrical, or other recording, or a transcript thereof, or which is a substantially verbatim recital of an oral statement made by said person to an officer or agent of the State and recorded contemporaneously with the making of such oral statement. . .

Claude Smith plainly qualifies as a person known to the prosecutor to have information relevant to the offense charged.[22] The prosecutor was obligated to disclose Smith to the defense as a potential witness, and he did so in his discovery response of December 3, 1982 (R.20). Lieutenant Lee, as institutional investigator for Union Correctional Institution and as a person acting under the express instructions of the assistant state attorney to "find out what [Claude Smith] had to say" (T.497; MNTT.39), plainly qualifies under Rule 3.220(a)(1)(ii) as both "an officer [and an] agent of the State". Consequently, the tape recorded statement made by Smith to Lt. Lee, perhaps as early as June 1, 1983 in Room 5 at UCI (see T.549,551), in which Smith for the first time (and contrary to his earlier statements to Lee and Inspector Sands) purported himself to be an eyewitness to the exit of the assailants from Earl Owens' cell, was subject to the rules of reciprocal discovery.

See also Balboa v. State, 446 So.2d 1134 (Fla. 3d DCA 1984),[22a] in which the state failed to furnish the tape recorded statements of two witnesses on the asserted ground that the recordings were "work product", and therefore not subject to discovery. The trial court agreed with the state's contention, and denied the defendant's motion to impose sanctions, without conducting a Richardson hearing. The appellate court, emphasizing the language in Rule 3.220(a)(1)(ii) with reference to a "stenographic, mechanical, electrical, or other recording", found that the tape recorded statements were discoverable material, and that "opinions, theories, or conclusions of attorneys are privileged [as work product], but statements of witnesses

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[22]The version of the events which Smith related to Inspector Sands and Lt. Lee the day after the crime was that he (Smith) heard a scream, and then saw Frank Wise (who appeared to be standing lookout) lift a blanket which was draped over the door of Cell B-3, and look into the cell; he (Smith) then left B-Floor.

[22a]With regard to Rule 3.220(a)(1)(ii), see also Cooper v. State, 377 So.2d 1153 (Fla. 1979); Black v. State, 383 So.2d 295 (Fla. 1st DCA 1980).

to attorneys are not." Since the trial court had failed to conduct a Richardson inquiry "to determine whether prejudice resulted from the state's failure to furnish the tapes", Balboa's conviction was reversed for a new trial.

The prosecutor's discovery obligation requires more than the mere inclusion of names on a witness list; the state is required to fully comply with all of the rules of discovery. Cumbie v. State, 345 So.2d 1061 (Fla. 1977); Donahue v. State, 464 So.2d 609, 610-11 (Fla. 4th DCA 1985); Haversham v. State, 427 So.2d 400, 402 (Fla. 4th DCA 1983); Brey v. State, 382 So.2d 395, 398 (Fla. 4th DCA 1980). If Claude Smith's tape recorded statement had been in existence at the time appellants initially invoked reciprocal discovery, the state would have been required to furnish it. That being the case, the state was also under a continuing discovery obligation--once it obtained the taped statement from Smith, it was required to promptly furnish it to the defense. Rule 3.220(f) provides:

> **Continuing Duty to Disclose.** If, subsequent to compliance with the rules, a party discovers additional witnesses or material which he would have been under a duty to disclose or produce at the time of such previous compliance, he shall promptly disclose or produce such witnesses or material in the same manner as required under these rules for initial discovery.

See e.g. Cumbie v. State, 345 So.2d 1061 (Fla. 1977); Cooper v. State, 336 So.2d 1133, 1137-38 (Fla. 1976); Raffone v. State, 483 So.2d 761 (Fla. 4th DCA 1986); Alfaro v. State, 471 So.2d 1345 (Fla. 4th DCA 1985); Neimeyer v. State, 378 So.2d 818, 820-21 (Fla. 2d DCA 1979); Waters v. State, 369 So.2d 979 (Fla. 3d DCA 1979).

In Cooper v. State, 336 So.2d 1133, 1137-38 (Fla. 1976),[23] this Court addressed the question of how prompt is prompt enough under the continuing discovery rule:

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[23]This Court affirmed Cooper's conviction and sentence, upon the conclusion that, although the state had indeed committed several discovery violations, the trial court in that case conducted full and adequate Richardson inquiries and had determined that the defense had not been prejudiced or surprised. See Wendell v. State, 404 So.2d 1167, 1169 (Fla. 1st DCA 1981) and McClellan v. State, 359 So.2d 869, 879 (Fla. 1st DCA 1978), both of which distinguish Cooper on this point. In the present case, as in Wendell and McClellan, the minimal requirements of the Richardson procedure were not met, and the state was not held to its burden of demonstrating non-prejudice to the defendants' ability to properly prepare for trial.

> As the trial date nears, a prosecutor has the duty under Rule 3.220(f) to "promptly disclose" previously unidentified witnesses and material. A delay of days might be sufficiently prompt where several months remain before trial, but where a complex trial involving a human's life was scheduled to begin in one week immediate disclosure is dictated by the Rule.

See also Neimeyer v. State, 378 So.2d 818, 820-21 (Fla. 2d DCA 1979); McClellan v. State, 359 So.2d 869, 878 (Fla. 1st DCA 1978). Cf. State v. Del Gaudio, 445 So.2d 605, 610 (Fla. 3d DCA 1984) (prejudice caused by tardy disclosure "is completely removed when the defendant is provided with the discovery information and material and is afforded an adequate opportunity to make use of the information and material in the preparation of his defense" [emphasis in court's opinion]. "When the state furnishes the discovery sufficiently in advance of the trial date to enable the defendant to utilize the discovery in the preparation of his defense, there is no longer any prejudice from the previous delay" [emphasis supplied]).

In Griffis v. State, 472 So.2d 834, 835 (Fla. 1st DCA 1985), the First District Court of Appeal observed:

> Rule 3.220 can be violated even if disclosure is ultimately made before trial. In Neimeyer v. State, 378 So.2d 818 (Fla. 2d DCA 1979), for example, the prosecutor failed to disclose until the night before trial information he had obtained six or seven days earlier. The court held this was a discovery violation and reversed because the trial court failed to conduct an adequate inquiry.

In Griffis, the state failed to disclose, until the day before trial, a statement allegedly made by the defendant to a police officer to the effect that he was not in town the day the robbery occurred. The appellate court reversed for a new trial, based on the tardy disclosure coupled with the trial court's failure to make a Richardson inquiry, and noted that the statement "remained undisclosed until the eve of trial" notwithstanding "the fact that it was made to a police officer and hence at least in the constructive possession of the prosecutor from the time it was made". Griffis v. State, supra, at 835. See also, State v. Coney, 294 So.2d 82 (Fla. 1973); Hutchinson v. State, 397 So.2d 1001, 1002 (Fla. 1st DCA 1981). In Hutchinson, the prosecutor and defense counsel simultaneously became aware, during in informal interview of the arresting

officer the day before trial, of a statement allegedly made by the defendant. The trial court undertook a Richardson inquiry, but the inquiry did not cover the question of procedural prejudice to the defendant. The appellate court reversed, based on the inadequacy of the inquiry, and said:

> Initially, we find that an inquiry was necessary to determine prejudice when it became apparent that a discovery violation existed. See Cooper v. State, 377 So.2d 1153 (Fla. 1979). As to the existence of a violation, it is clear that a defendant may be entitled to discovery of materials within the constructive possession of the state. See State v. Coney, 272 So.2d 550 (Fla. 1st DCA 1973), affirmed, 294 So.2d 82 (Fla. 1973).

Hutchinson v. State, supra, at 1002.

The circumstances of the discovery violation in the present case are far more egregious than those of any of the aforementioned cases, and strongly suggest deliberate sandbagging on the part of the prosecutor. Here, as far as anyone apparently knew, Claude Smith was a potential witness who had seen Frank Wise in the B-Floor doorway, but who had not seen anyone come out of the cell in which Earl Owens was killed. Smith's observations, as told to Inspector Sands and Lt. Lee the day after the crime, were partially helpful to the state (in that they corroborated Frank Wise's presence on the floor) and partially harmful to the state (in that they suggested that Wise himself might be involved in the murder as a "lookout", and in that Smith said he saw Wise lift the blanket and look into the cell, while Wise denied doing this). At the beginning of the January 13, 1983 deposition, defense attorney Mazar identified himself as counsel for Mr. Troy. Claude Smith asked "Who is Mr. Troy?" At that point, Assistant State Attorney Tobin interjected "Well, you are about to tell him you don't know anything about it, I know because you don't and I already have your statement." (Claude Smith depo., p.3). When Smith refused to answer any questions on deposition because of generalized concern for his safety,[24] the prosecutor met with Smith privately. When they returned, the prosecutor

[24]The prosecutor acknowledged that there were no allegations of any specific threats, direct or indirect, toward Smith. It was simply that Smith was housed "in the same general area as potential defendants and defendants", and subjectively felt that he was at risk (Claude Smith depo., p.5).

stated that he had discussed with Smith "a couple of things regarding his personal safety, but I am incapable at this time of making him any guarantees or as to any statement of what could or could not be done for him. Because of that, he doesn't feel that, because of his own safety, he can answer questions" (Claude Smith depo., p.5). The prosecutor further stated that Smith

> . . . is not under the Evanko Decision. He is not [talking] of invoking the Evanko saying that he doesn't ever have to answer them. He is simply saying that until we can discuss those matters with him more fully, he doesn't wish to answer.
>
> MR. MAZAR [defense counsel]: Do you intend to go into this a little bit farther?
>
> MR. TOBIN: Yes, I will. I will at a future date. I am incapable of doing it right now because it is 4:30 in the afternoon.

(Claude Smith depo., p.5-6).

Claude Smith himself closed out the proceedings by telling defense counsel that he would give a full statement "[w]hen the time is right, if he say the time is right"; the last comment obviously a reference to Mr. Tobin.

The fact that defense counsel did not file a motion to compel does not give the state carte blanche to violate the rules of discovery with regard to evidence subsequently obtained from that witness. See McCollough v. State, 443 So.2d 147, 148 (Fla. 1st DCA 1983); Brey v. State, 382 So.2d 395, 397-98 (Fla. 4th DCA 1980); McClellan v. State, 359 So.2d 869, 877 (Fla. 1st DCA 1978); Lavigne v. State, 349 So.2d 178, 179-80 (Fla. 1st DCA 1977). For that matter, when the state has failed to disclose evidence or material required to be furnished to the defense under the discovery rules, the state's violation (and the need to conduct a Richardson inquiry) is neither excused nor obviated by the fact that the state has listed the witness and made him available for deposition. McCollough v. State, supra, at 148; Brey v. State, supra, at 397-98; McClellan v. State, supra, at 877; Lavigne v. State, supra, at 179-80. Nor does the fact that the defense has failed to take advantage of the opportunity to depose the witness obviate the state's violation. McCollough; Brey; McClellan; Lavigne. It follows even more forcefully, then, that where, as here, the defense has tried unsuccessfully to depose an uncooperative state witness--

and where defense counsel could easily have been misled, by the prosecutor's representations that he would take care of the witness' problem, into believing that a motion to compel would not be necessary--the prosecutor cannot under these circumstances shield his own subsequent violation of the discovery rules from the scrutiny of a Richardson inquiry by shifting the blame to the defendants for "failing" to move to compel him to do what he told them he was going to do.

Based on Mr. Tobin's representations at the aborted deposition of January 13, 1983, defense counsel could reasonably have assumed that Mr. Tobin was going to look into what could be done to alleviate Claude Smith's concern for his safety, and would make whatever arrangements might be necessary with the prison administration regarding Smith's housing assignment or even a possible transfer. Obviously, it was within the power of the state, and was not within the power of the defense, to take such measures. Moreover, Mr. Tobin expressly assumed the burden of going forward with whatever actions were needed to make Smith available for deposition, by his statements to defense counsel. From that point on, up until around the first of June, it appears that neither party took any action to reschedule a deposition of Claude Smith. A week, or possibly as early as two weeks before trial, Assistant State Attorney Tobin, as he was preparing for trial, "noticed that the defense did not take any action with Mr. Smith" (T.497, MNTT.39). Without notifying defense counsel, and without any apparent concern that his own representations might have lulled the defense into "not tak[ing] any action with Mr. Smith", Tobin immediately dispatched Lieutenant Lee to talk to Smith "to find out what he had to say" (T.497, MNTT.39). Therefore, when Lee took a tape recorded statement from Smith, Assistant State Attorney Tobin was immediately in constructive possession of the statement, not only because it was in the hands of a state investigator and correctional officer [see State v. Coney, supra; Griffis v. State, supra; Hutchinson v. State, supra], but also because Lt. Lee was acting under Tobin's direction. Moreover, by his own admission, Tobin was in actual possession of the tape the week before

trial (T.497), yet he waited until the following week, when the trial was underway, before getting around to mentioning it to defense counsel. This delay alone, apart from any of the surrounding circumstances which make it all the more egregious, was a clear and critical violation of the discovery rules. See Cooper v. State, supra, at 1337-38; McClellan v. State, supra, at 878. In Neimeyer v. State, 378 So.2d 818 (Fla. 2d DCA 1979), the state's initial discovery response included an autopsy report prepared by the assistant medical examiner (Dr. Newab). The autopsy showed that the victim had been shot six times with a .38 caliber handgun and once with a 12 gauge shotgun. Neimeyer maintained that he had acted in self-defense, and that the victim had continued to move aggressively toward him even after being shot six times with the handgun, thereby making it necessary to fire the final shotgun blast. In her pre-trial deposition, Dr. Newab indicated that there was nothing in her findings inconsistent with the theory that the victim was moving toward the defendant at the time the shotgun blast was fired; she further indicated that in her opinion the victim was probably moving at that time, though she could not tell in what direction. Six or seven days before trial, the prosecutor was notified by Dr. Newab's superior that there might have been some damage to the victim's spinal column which was not reflected in the autopsy report. On the afternoon before the trial, the prosecutor met with Dr. Newab, who now stated that she was prepared to testify that in her opinion one of the .38 caliber bullets had severed the victim's spinal cord (which would have rendered him immobile at the time the shotgun blast was fired). That evening (the night before trial), the prosecutor called defense counsel and informed him of this development.

The Second District Court of Appeal, reversing for a new trial based on the above scenario, coupled with the trial court's failure to determine (as required by Richardson) whether the defendant had been prejudiced in his ability to prepare for trial, said this:

> Florida Rules of Criminal Procedure 3.220(f) places a continuing duty upon the state to disclose discovery material "promptly". In Cooper v. State, 336 So.2d 1133 (Fla. 1976), the supreme court said:
>
> > As the trial date nears, a prosecutor has the duty under Rule 3.220(f) to "promptly disclose" previously unidentified witnesses and material. A delay of days might be sufficiently prompt where several months remain before trial, but where a complex trial involving a human's life is scheduled to begin in one week, immediate disclosure is dictated by the Rule.
>
> Id. at 1137.
>
> In the instant case the assistant state attorney admitted that he was alerted six or seven days before trial to the possibility that Dr. Newab might testify to information bearing critically on appellant's defense which was not included in her autopsy report, and which was at least arguably inconsistent with statements she made during her deposition; yet the defense was not warned of this possibility, even though the trial date was rapidly approaching. Under these circumstances we hold that the state's failure to inform the defense of the new information until the eve of trial was a violation of the discovery obligations imposed on the state by Florida Rules of Criminal Procedure 3.220(f).

Neimeyer v. State, supra, at 820-21.

In Waters v. State, 369 So.2d 979 (Fla. 3d DCA 1979), the appellate court reversed the defendant's convictions of multiple offenses, based on the state's violation of its continuing discovery obligation under Rules 3.220(a)(1)(iii) and 3.220(f). The circumstances were as follows:

> The principal issue for the jury to determine in this case was whether or not the defendant was identified as the person who perpetrated the crimes with which he was charged. A witness for the State was Delandrea Humose. Delandrea was the girlfriend of the defendant. Early in the investigation of the case, she gave a sworn statement which would have been exculpatory to the defendant in that it would have materially aided his contention that he was not the person involved. Delandrea subsequently gave two sworn statements to the prosecutor and defense counsel respectively. In both of these statements, she recanted her former sworn statement to the police and stated entirely different circumstances. But these circumstances would not have been inculpatory to the defendant. Two days prior to trial, the State induced Delandrea to take a polygraph test resulting in a completely different statement by the witness and which, in addition, resulted in a revelation by her that the defendant had made statements which, if

> true, would show that the defendant (1) was present at the scene of the crime and (2) induced the witness to make the first, false statement to the police. There is evidence in the record that the prosecuting attorney, instead of complying with the provisions for mutual discovery, withheld the information that Delandrea had changed her story from that given the defense attorney. The record further reveals that on one occasion, the prosecuting attorney informed the defense attorney ". . . that he had a surprise . . ." for him and that he further informed the attorney that he had no new statement from the witness Delandrea Humose.
>
> As a result of the State's failure to comply with the mutual discovery rule, defense counsel not only received the promised surprise but also stumbled into a statement by the witness that her testimony was now true because she had taken a polygraph test which had confirmed it.

Waters v. State, supra, 369 So.2d at 979-80.

The District Court in Waters found that the trial court's conclusion that the prosecutor had not violated the discovery rules was erroneous, and that "the breach of the State's duty to make continuing discovery resulted in reversible error". Waters v. State, supra, 369 So.2d at 980.

See also Raffone v. State, 483 So.2d 761 (Fla. 4th DCA 1986); Alfaro v. State, 471 So.2d 1345 (Fla. 4th DCA 1985); Snow v. State, 391 So.2d 384 (Fla. 2d DCA 1980).

In the present case, Claude Smith had given a statement to the prison investigators the day after the crime, in which he acknowledged being on the floor and seeing Frank Wise lift the blanket and look into the victim's cell, but in which he maintained that he left the floor before the perpetrators came out of the cell. Both the prosecutor and the defense attorneys were aware of Smith's statement, from the report and depositions of Inspector Sands and Lt. Lee. When Smith, at the beginning of his own aborted deposition, asked who Mr. Troy was, the prosecutor said "Well, you are about to tell him you don't know anything about it, I know because you don't and I already have your statement." The fact that Smith balked at answering questions on deposition and expressed concern for his safety cannot by any stretch of the imagination be construed as putting defense counsel on notice that Smith would change his story and purport to be an eyewitness to Troy and

Brown exiting the cell. See Raffone v. State, supra, at 764. [Smith's fears were admittedly not based on any actual threats, but only on the generally recognized principle that it is not safe to be labeled a "snitch" in a maximum security prison. It could easily have been Frank Wise he was afraid of, and he didn't even appear to know who Larry Troy was.] The rules of discovery put the obligation squarely on the shoulders of Assistant State Attorney Tobin to notify defense counsel promptly, once the state obtained the tape recorded statement from Claude Smith in which he changed his testimony to say now that he did see the assailants exit the cell. And "promptly", in light of the circumstances involved here and the fact that the trial date was rapidly approaching, meant immediately, or as soon thereafter as humanly practicable. Cooper; Cumbie; Raffone; Alfaro;Griffis; Snow; Neimeyer; Waters; McClellan; Fla.R.Cr.P. 3.220(f). "Promptly" did not mean that Assistant State Attorney Tobin was at leisure to assign Lt. Lee to find out what Claude Smith might have to say; to receive Smith's tape recorded statement from Lee at least the week before trial; and to wait until the trial was in progress (and, therefore, until it was too late for the defense to take account of this new development in preparing for trial, see State v. De Gaudio, 445 So.2d 605, 610 (Fla. 3d DCA 1984)) before even mentioning the existence of the tape to defense counsel. See, especially, Neimeyer v. State, supra.

Moreover, there are indications in the record[26] that the sandbagging tactics

[26]To the extent that the record is not absolutely clear as to the precise times and dates of, for example, Mr. Tobin's request to Lt. Lee to interview Smith; the tape-recorded interview itself; the receipt by Mr. Tobin of a copy of the tape; and the point during the trial when Mr. Tobin mentioned the tape to defense counsel; this can be attributed to the trial court's failure to conduct an adequate Richardson inquiry, or any Richardson inquiry. The trial court never required the prosecutor to explain the reasons for his conduct [see Wilcox v. State, 367 So.2d 1020, 1022 (Fla.1979)], and never engaged in the "prescribed fact-finding process" required by Richardson to uncover the full circumstances of the violation [see Donahue v. State, 464 So.2d 609, 611 (Fla. 4th DCA 1985); see also Kilpatrick v. State, 376 So.2d 386, 389 (Fla.1979)]. In Donahue (at 611), the appellate court noted that the immediate purpose of the Richardson rule is "to ensure the development of a factual predicate in the record and, thus, enable the [trial] court to exercise its discretion in a considered, deliberate fashion." (The ultimate purpose, the Donahue court continued, is to ensure a fair trial by preventing the use of "surprise, trickery, bluff and legal gymnastics").

of the assistant state attorney may have persisted into the trial itself, and in the manner in which he belatedly revealed the existence of the tape to defense counsel. At the hearing on appellants' motion for new trial, on November 30, 1983, defense counsel represented that the prosecutor first advised the defense of the existence of the taped statement "on the day of trial, subsequent to jury selection, which may have been the first day of testimony" (MNTT. 17-18), after the first witness or first several witnesses had testified (MNTT.18-19). According to defense counsel, Assistant State Attorney Tobin commented at that time that the taped statement was "essentially the same as what he [Claude Smith] said before" (MNTT.18). Defense counsel took this as a reference to Smith's statement to Inspector Sands the day after the murder (MNTT.18, see MNTT.13). As defense counsel were subsequently to learn, however, the taped statement was radically different from Smith's earlier statement to Sands, as to the central (and for all intents and purposes, the only) issue at trial--identification.

In that regard it is revealing to look at the opening statements to the jury made by counsel for the respective parties. Mr. Tobin (unless he had neither listened to the tape which had been in his physical possession since some time the week before, nor spoken with Lt. Lee, who had interviewed Smith at his request) had to have known by then that Claude Smith would testify that he'd seen the assailants come out of the cell (though conceivably he may not have known for certain whether Smith would be able to make an in-court identification). In his opening statement, Mr. Tobin walked a thin line,[27] not quite telling the jury (or

[27]See Raffone v. State, 483 So.2d 761, 764 (Fla. 4th DCA 1986) (first hint of new, independent evidence to support the trafficking charge came when the state, after trial had begun, provided a supplemental report stating that another item had been tested and that it revealed the presence of 52.0 grams of cocaine; and "[e]ven then the prosecutor stated, in carefully selected words, that he would not seek to introduce "it" into evidence").

defense counsel) that Smith had observed the perpetrators' exit:

> Now, the two Defendants were observed leaving the cell with their knives by an inmate, Frank Wise. He will tell you that, in fact, he saw them, he will tell you about the incident and he will describe in fact giving a signal to them to indicate that the coast was clear.
>
> There is another inmate that was there at the time, Claude Smith, who will describe the same incident to you.
>
> In fact, the day after, or within a couple of days, Claude Smith began by identifying Frank Wise, thinking that he, in fact, was the lookout.

(T.287).

Defense counsel, on the other hand, clearly had no idea of what was coming, even after hearing the prosecutor's carefully worded comment. Rather, as a direct consequence of the prosecutor's withholding of the tape recorded statement, defense counsel was still laboring under the misconception that not only was Claude Smith not an eyewitness, but also that his testimony would impeach Frank Wise, who claimed to be one:

> Now, was there anybody--as the state says, was there anybody really there to see those people exit the cell? Was there anybody there? Yes, there very well was someone there. But that someone who saw the exit was not Frank Wise.[28]

(T.297).

* * *

> Now, Frank Wise. Frank Wise, is he a witness? Is Frank Wise a witness? Well, you've heard about Claude Smith saw him up there. What kind of witness is Frank Wise? Claude Smith saw him up there peeking in the cell, looking into the cell to see what happened. Well, he categorically denies that. He denies that.

(T.300).

Because he was not forewarned before trial that Claude Smith had given a taped statement in which he claimed to be an eyewitness, defense counsel promised

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[28]Defense counsel suggested to the jury that the evidence would show that the person who saw the exit was Noel White, and that the perpetrators were not Troy and Brown (T.297-99).

the jury something which the evidence did not deliver. Not only did Frank Wise (whose credibility the defense was thoroughly prepared to impeach, see p.10-17 of this brief) testify that he saw Troy and Brown exit the cell, but then the state put on Claude Smith who testified that he too saw Troy and Brown exit the cell.[29] [Of course Smith said he was standing a foot away from Frank Wise at the time, while Wise said there was nobody other than himself in the vicinity, but that is Issue II.] Moreover, contrary to what defense counsel advised the jury to expect, Smith testified that the only thing he ever saw Frank Wise doing was leaning up against the big steel door at the entrance to B-Floor, and, on one occasion, waiving his hand (T.540-41, 546-47).

The actions of the assistant state attorney in this case with regard to the tape-recorded statement of Claude Smith were in clear violation of the letter of the discovery rules [3.220(a)(1)(ii) and 3.220(f)], and in gross violation of the spirit and the purpose of those rules. The second question, then, is whether defense counsel, by objecting on the basis of a discovery violation, called the trial court's attention to the state's breach of its duty, thereby triggering the trial court's obligation to conduct a Richardson inquiry. See, specifically, Wilcox v. State, 367 So.2d 1020 (Fla.1979); Lucas v. State, 378 So.2d 1149, 1151-52 (Fla.1979); Raffone v. State, 483 So.2d 761, 764 (Fla. 4th DCA 1976); Wortman v. State, 472 So.2d 762, 766 (Fla. 5th DCA 1985); State v. Del Gaudio, 445 So.2d 605, 608-09 (Fla. 3d DCA 1984);

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[29] See Rolle v. State, __So.2d__ (Fla. 4th DCA 1986) (11 FLW 1559, 1560) (Anstead, J., concurring) (reciprocal discovery rules contemplate that any evidence [required to be furnished under 3.220] or witnesses to be called at trial be disclosed in advance of trial; "The parties are stuck with those witnesses, absent unusual circumstances, and whatever "warts" those witnesses may have. The parties are not free, upon observing that one of their witnesses has been substantially impeached during trial, to go out and get another witness in his place"). [Note also that the ultimate conclusion of the 4th DCA panel and Judge Anstead in Rolle--that the error was harmless in that particular case--is invalid under this Court's decisions in Cumbie v. State, 345 So.2d 1061 (Fla.1977) and Smith v. State, __So.2d__ (Fla.1986) (Case Nos. 67,772 and 67,773, opinion filed December 24, 1986).

Miller v. State, 403 So.2d 619, 621 (Fla. 5th DCA 1981); and see generally Castor v. State, 365 So.2d 701, 703 (Fla.1978) (to meet objectives of contemporaneous objection rule, objection must be sufficiently specific to apprise the trial judge of putative error, and preserve the issue for intelligent review on appeal).

In the present case, immediately before Claude Smith was scheduled to testify, defense attorney Salmon (counsel for Willie Brown) objected to the testimony on the ground that Smith had refused to answer questions on deposition[30] (T.491-92). Assistant State Attorney Tobin countered that the defense should have filed a motion to compel (T.492-95). Defense attorney Mazar (counsel for Larry Troy) indicated that he was under the impression, from the prosecutor's representations at the deposition, that he (Mr. Tobin) was going to take whatever measures would be necessary to secure the witness' cooperation:

> MR. MAZAR: May I point out, that Mr. Tobin, for the deposition--I think I asked him if he was going to talk to him about this.
>
> THE COURT: Well, I'll tell you one thing. Mr. Tobin would have talked to him if it had been called to my attention.
>
> MR. MAZAR: He didn't talk to him at all. I said--I asked him, "Do you intend to go into this a little bit further?" He said, "Well, I will at a future date. I am incapable of doing it right now because it is three in the afternoon now. I have never met Mr. Smith. He will vouch for that. And he told me he was unaware of it until he asked to talk to me."
>
> So, you know, he said he was going to talk to him and get him to talk to us.
>
> Now, when we tried to interview him the other day he still wouldn't talk to us.
>
> So what's--you know, does the law require you to file futile motions?
>
> MR. TOBIN: The law requires, Your Honor, a motion to compel. I have four separate cases--
>
> THE COURT: The law requires you to bring that to my attention.
>
> Not having brought it to my attention, you can't be heard now to complain about the State calling him as a witness.

(T.495).

[30]That objection is not being raised as a ground for reversal in this appeal.

At that point, Mr. Mazar brought another matter to the trial court's attention:

> MR. MAZAR: Your Honor, may I bring up another matter as far as Mr. Smith is concerned?
>
> Mr. Tobin very forthrightly told us that they took a statement recently and it was available to us.
>
> But there again, that's a situation just like we are in, having not brought this to your attention before.
>
> Now, if he wants to take a statement from a witness, what, a couple of days, or during trial and then have that available to him and not furnishing on discovery, I say that is grounds for striking this witness.

(T.496).

Mr. Mazar further pointed out that the state's discovery obligation is a "continuing duty" (T.497). Assistant State Attorney Tobin said:

> MR. TOBIN: Your Honor, what occurred was, as I was preparing for trial I noticed that the defense did not take any action with Mr. Smith. For that reason I asked Lieutenant Lee to talk to Mr. Smith again. He did that; I got the tape and I told them they could listen to the tape.

(T.497).

When defense counsel pointed out that they were not informed of the existence of the tape until "[t]his morning of trial", Mr. Tobin disingenuously replied, "I just got it the week before. I cannot give it to them until I can get a hold of it" (T.497). Mr. Tobin also did not appear to recognize that the tape recorded statement was discoverable material. He said to defense counsel:

> You went over and talked to Noel White a half hour ago.
>
> MR. MAZAR: I didn't take a statement.
>
> MR. TOBIN: There's no difference.
>
> MR. SALMON: Your Honor, I--
>
> THE COURT: Gentlemen--
>
> MR. MAZAR: If he took a taped statement we are entitled to see it. That's discovery. Going to talk to or interview a witness is not discovery.

(T.497-98).

At that point, the trial court interjected "I know good and well what the law is" (T.498), and announced his ruling (T.498-99).

It can plainly be seen that defense counsel specifically objected to the testimony of Claude Smith on the basis of the state's discovery violation in failing to

promptly disclose the tape recorded statement, and that this objection was made separately from, and independently of, the earlier objection (which had already been overruled by the trial court) based on the witness' non-cooperation in the January deposition.

In Wilcox v. State, 367 So.2d 1020, 1022 and n.1 (Fla.1979), the state contended that the defendant failed to pursue his discovery objection and thereby waived it. This Court disagreed, and commented that the state's "contemporaneous objection" argument could be disposed of summarily. The Court observed that "[t]he following colloquy, conducted immediately after the disputed testimony was elicited, makes it clear that defense counsel objected timely and apprised the court of a possible discovery violation:

> MR. FLYNN [defense counsel][after asking for and receiving a sidebar conference]: Your Honor, at this point, I would move for a mistrial based on the statements of the officer concerning what the defendant said. I have before me the State's response for discovery, it indicates there are no statements of the defendant. We now have, contrary to the State's discovery, a statement before the jury which is number one, of extremely questionable relevance; number two, reflects that the defendant, a junvenile, has been in jail on prior occasions and accordingly has been arrested in the past and possibly even convicted of crimes in the past. There was no need for this testimony. It's irrelevant. [Emphasis supplied by the Court.]

Wilcox v. State, supra, at 1022, n.1.

Accordingly, this Court determined in Wilcox that the above objection triggered the need for the trial court to conduct a Richardson inquiry, and his failure to do so was reversible error.

See also, generally, Jackson v. State, 451 So.2d 458, 461 (Fla.1984)(defense objection on relevancy grounds was sufficiently specific to apprise the trial judge of putative error, and to preserve "collateral crime" issue for appellate review"); Spurlock v. State, 420 So.2d 875, 876-77 (Fla.1982); Thomas v. State, 419 So.2d 634, 635-36 (Fla.1982); Williams v. State, 414 So.2d 509 (Fla.1982)("magic words" are not necessary to make a proper objection, as long as the specific grounds are fairly presented to the trial court); Spurlock v. State, supra, at 876; Thomas v. State, supra, at 635-36; Simpson v. State, 418 So.2d 984, 986-87 (Fla.1982); Brown v. State, 206

So.2d 377, 384 (Fla.1968)(where defense objection has been overruled by the trial court, further objection or argument would be futile, and is not necessary to preserve issue for appeal). [30a]

In Lucas v. State, 376 So.2d 1149 (Fla.1979), in contrast, this Court found that defense counsel in that case never objected on discovery grounds, and consequently the trial court's obligation to conduct a Richardson inquiry was never activated. In Lucas, when the state called an unlisted rebuttal witness, defense counsel asked to approach the bench and said "Your honor, what I am looking for is my witness list provided to me by the state in this matter. To my knowledge--." The trial judge said (incorrectly) "Rebuttal witnesses does not have to be furnished", and defense counsel said "Very well, your honor." This Court concluded on appeal that "while defense counsel brought the state's non-compliance to the attention of the court, he did not interpose an objection; but rather he deferred to the trial court's statement of the applicable law." Lucas v. State, supra, at 1152. In the absence of an objection, this Court concluded, the trial judge was not required to make further inquiry.

Lucas was distinguished on this point in Miller v. State, 403 So.2d 619, 621 (Fla. 5th DCA 1981). In that case, the state called an unlisted rebuttal witness, whereupon the defense objected that the witness had not been listed in the state's discovery response. The trial court summarily overruled the objection. The appellate court, reversing on the basis of the trial court's failure to conduct a Richardson inquiry, noted:

> The present case is ... distinguishable from Lucas v. State, 376 So.2d 1149 (Fla.1979), wherein defense counsel did not object to a surprise rebuttal witness, and instead merely informed the judge that the witness was not on the state's witness list. In the present case, Miller's counsel clearly objected.

[30a] Contrast Matheson v. State, __So.2d__ (Fla.1987)(12 FLW 67), in which defense counsel never interposed any discovery objection to any portion of undercover officer's testimony, and never raised specific issue at trial of whether the state had violated discovery rules by failing to disclose statements made by defendant. Under these circumstances, this Court determined that the 4th DCA's conclusion that the grounds not asserted below were not preserved for appeal did not conflict with Spurlock; Thomas; and Castor; nor did they conflict with Richardson and Cumbie.

See also State v. Del Gaudio, 445 So.2d 605, 608-09 (Fla. 3d DCA 1984) ("When a discovery violation is called to the trial court's attention by a defendant's timely objection or motion, Lucas v. State [citation omitted], the court is required to conduct the hearing prescribed by Richardson [citation omitted], in which hearing it must determine 'what effect, if any, did [the violation] have upon the ability of the defendant to properly prepare for trial'").

The Miller court also rejected the state's novel and specious contentions that the defendant waived his discovery rights by "simply objecting and not asking for a more specific remedy" or that the defense was obligated to ask for something less than outright exclusion of the evidence. The appellate court noted that Ziegler v. State, 402 So.2d 365 (Fla.1981) [relied on by the state in Miller] "did not change the rule of law ... that once an objection is made, an inquiry must be had, prejudice or its absence determined, and a proper remedy or sanction fashioned, if need be."[31] Miller v. State, supra, at 621.

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[31]See also Lavigne v. State, supra, at 179-80 (quoted in McClellan v. State, supra, at 877:

> The State argues that it informed Lavigne that Sciadini would be a witness at the trial, that the State made Sciadini available for interview or deposition, that Lavigne did not move for a continuance, that Lavigne does not claim prejudice and that the trial court's inquiry was sufficient. None of these arguments has merit. Lavigne had no reason to interview or take Sciadini's deposition because he had not been informed by the State as required by a rule of criminal procedure that Sciadini was a witness to an oral statement made by him. There is no requirement that Lavigne ask for a continuance because the State violated a rule of criminal procedure. The law does not require that a defendant claim prejudice; the law requires that the State prove there is no prejudice to the defendant. The trial court did not make the inquiry.

See Wendell v. State, 404 So.2d 1167, 1169 (Fla. 1st DCA 1981), which recognizes that an opportunity to depose an undisclosed witness (while it may turn out to be an appropriate remedy, after a Richardson inquiry to determine prejudice has been conducted) is not an adequate substitute for a Richardson inquiry. See also Johnson v. State, 312 So.2d 231, 233 (Fla. 2d DCA 1975) ("Having made the [discovery] objection, it was not incumbent upon appellant's counsel also to move for a continuance in order to permit him time to depose Mr. Kuban or to obtain an expert of his own"; trial court's failure to conduct Richardson inquiry was reversible error).

In Raffone v. State, 483 So.2d 761, 764 (Fla. 4th DCA 1986), the state tried a different procedural tack, arguing that the discovery issue was not preserved "because the defendants moved for a mistrial instead of objecting because of a discovery violation." The appellate court said "This argument is without merit. While the defendants did not recite particular magic words, the manner in which they brought the matter to the trial court's attention was more than sufficient to apprise the court of the nature of their complaint." See also Wortman v. State, 472 So.2d 762, 765-66 (Fla. 5th DCA 1985).

In the present case, defense attorney Mazar clearly objected to the testimony of Claude Smith, and asked to exclude him as a witness, on the ground that the assistant state attorney had violated the discovery rules by not disclosing until the midst of trial the tape recorded statement made by Smith to Lt. Lee (T.496-97). Mr. Mazar specifically asserted that the statement was not furnished on discovery (T.496), that the obligation to disclose its existence was "a continuing duty" (T.497), and that "If he [Mr. Tobin] took a taped statement we are entitled to see it. That's discovery" (T.497-98). Unlike defense counsel in Lucas v. State, supra, when the trial court announced "I know good and well what the law is", and proceeded to rule adversely to appellants, Mr. Mazar did not defer to the trial court's misunderstanding of the law, nor did he in any way waive or withdraw his objection (T.498-500). The discovery objection was fairly, fully, and specifically presented to the trial judge, and the judge was therefore required to conduct an adequate Richardson inquiry before deciding what sanction, if any, was appropriate. His failure to do so is preserved for appellate review [Castor; Wilcox; Lucas; Raffone; Wortman; Del Gaudio; Miller], and is reversible error.

The third question posited at the beginning of this Point on Appeal is, under the circumstances of this particular case, the easiest of the three to answer. Did the trial court conduct an adequate Richardson inquiry? Florida case law is legion that, before allowing the admission of evidence objected to on the basis of a dis-

covery violation, the trial court must, at minimum, conduct a hearing and specifically determine:

> 1. whether the state's violation of the criminal rules of discovery was willful or inadvertent;
> 2. whether the violation was trivial or substantial;
> 3. whether the violation has prejudiced the ability of the defendant to properly prepare for trial.

Brey v. State, 382 So.2d 395, 398 (Fla. 4th DCA 1980).

See e.g. Richardson v. State, 246 So.2d 771, 775 (Fla.1971); Wilcox v. State, 367 So.2d 1020, 1022 (Fla.1979); Raffone v. State, 483 So.2d 761, 763 (Fla. 4th DCA 1986); Gant v. State, 477 So.2d 17, 19 (Fla. 3d DCA 1985); Donahue v. State, 464 So.2d 609, 611 (Fla. 4th DCA 1985); McCollough v. State, 443 So.2d 147, 148 (Fla. 1st DCA 1983); Haversham v. State, 427 So.2d 400, 401-02 (Fla. 4th DCA 1983); Clair v. State, 406 So.2d 109, 110 (Fla. 5th DCA 1981); Wendell v. State, 404 So.2d 1167, 1168-69 (Fla. 1st DCA 1981); McDonnough v. State, 402 So.2d 1233, 1234 (Fla. 5th DCA 1981); Neimeyer v. State, 378 So.2d 818, 821 (Fla. 2d DCA 818, 821 (Fla. 2d DCA 1979); McClellan v. State, 359 So.2d 869, 875 (Fla. 1st DCA 1978); all the way back to the pre-Richardson case of Ramirez v. State, 241 So.2d 744, 747 (Fla. 4th DCA 1970).

That is what the trial court is supposed to do when a party makes an objection based on a violation of the discovery rules. Here is what he did. Interrupting the argument which was taking place between Mr. Tobin and the defense lawyers as to whether there is a difference under the discovery rules between a tape recorded statement and just talking to a witness,the judge stated:

> I know good and well what the law is.
>
> Now, they're just the same, there never has been, and I don't know as there will be any death penalty case here. But if there is, the competency of counsel is the first thing, the last thing, th middle thing that is being seized upon. And that would be true if Clarence Darrow was down here to try it.
>
> Until it is made into utter ridiculousness, a procedure of law, I think the Supreme Court is going to straighten that out next year. If they don't perhaps the Congress will.
>
> But I know, Mr. Tobin, that you are exactly right. They should have filed.

> And outside of this being a capital case I just absolutely have to tell you to go ahead and call your witness. And that's just too bad.
>
> But the fact is that I just don't believe that these lawyers are incompetent, although, they inadvertently overlooked doing that.
>
> And I would rather, if you've got any witnesses that you can call other than this one, I would like for you to give them that tape and let them listen to it, although they should have listened to that last night for that matter.

(T.498-99).

At the trial court's suggestion, the assistant state attorney said he would call other witnesses during the remainder of the afternoon (T.499-500). Defense attorney Salmon asked "Can we have the tape?", and Mr. Tobin said "I will produce the tape now" (T.500). Claude Smith testified the following morning (T.535-58).

The trial court's ruling was, essentially, a non sequitur. Instead of addressing the discovery objection--without ruling on whether the prosecutor's delay in disclosing the tape was a violation of his continuing discovery obligation, and without even ruling on the question (which Mr. Mazar and Mr. Tobin were heatedly disputing) of whether a tape recorded statement is discoverable material--the trial judge simply resumed his chastisement of defense counsel[32] for not filing a motion to compel, after the aborted deposition in January. It is clear that the trial court's failure to conduct a Richardson inquiry resulted from one or more misapprehensions of law on his part, but it is not clear which ones. Did he agree with the prosecutor that the tape recorded statement made to Lt. Lee was not subject to the discovery rules? If so, he was wrong. Fla.R.Cr.P. 3.220(a)(1)(ii); Cooper v. State, supra, 377 So.2d 1153; Balboa v. State, supra. Did he agree with the prosecutor that sending Lt. Lee to interview Smith; then taking physical possession of the taped statement the week before trial; and then mentioning the existence of the tape to defense counsel during

[32]With regard to the trial judge's behavior throughout this entire trial, in repeatedly and often unjustifiably berating the defense attorneys, both in and out of the presence of the jury, see the brief of co-appellant Willie Brown. Appellant adopts by reference Brown's argument on this point. [A motion to adopt is being filed with this brief].

the evidentiary portion of the trial, is "prompt enough" disclosure within the meaning of the discovery rules? If so, he was wrong. Fla .R.Cr.P. 3.220(f); Cooper v. State, 336 So.2d at 1137-38; McClellan v. State, supra; Neimeyer v. State, supra; Griffis v. state, supra; see State v. Del Gaudio, supra, at 610. Or did he share the prosecutor's apparent notion that defense counsel's failure[33] to file a motion to compel, after Claude Smith refused to answer questions at the January deposition, conferred on the state some sort of license to commit subsequent discovery violations with respect to that witness, or excused the state from any further compliance with the reciprocal discovery rules? If so, he was wrong. See Fla.R.Cr.P. 3.220(a), (d) and (f); McCullough v. State, supra, at 148; Brey v. State, supra, at 397; McClellan v. State, supra at 877; Lavigne v. State, supra, at 179-80.

In Witmer v. State, 394 So.2d 1096, 1097 (Fla. 1st DCA 1981), in which the trial court overruled the defendant's discovery objection based on his misconception that rebuttal witnesses are not covered by the rule, the appellate court observed, "When the trial judge so labors under a misapprehension of law, it is difficult to conclude that a sufficient Richardson inquiry has been made, much less that non-prejudice to the Appellant has been shown." See also Clair v. State, 406 So.2d 109, 111 (Fla. 5th DCA 1981) (trial court erroneously concluded that oral statements of defendant were not discoverable unless made to police offers or as part of the "res gestae", "and hence he did not address any of the concerns outlined in Richardson"; error requires reversal); Balboa v. State, 446 So.2d 1135 (Fla. 3d DCA 1984) (trial court summarily denied defendant's motion for sanctions, because he accepted the state's erroneous contention that tape recorded statements made by witnesses to state attorneys were "work product" and hence not subject to discovery; failure to comply with Richardson required reversal for new trial).

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[33] A "failure" which, as previously discussed (p.44-46), may well have been caused in whole or in part by defense counsel's reliance on representations made by the prosecutor at that deposition.

In this appeal, the state will likely defend the trial court's summary ruling by claiming that it was "within his discretion" to allow the prosecutor to call Claude Smith as a witness, especially since the testimony was postponed until the following morning so defense counsel could listen to the tape. This argument misses the whole point of Richardson, and the dozens of appellate decisions which follow it. See, especially, Wendell v. State, 404 So.2d 1167, 1169 (Fla. 1st DCA 1981); McClellan v. State, 359 So.2d 869, 874, 875-80 (Fla. 1st DCA 1978); Salamone v. State, 247 So.2d 780 (Fla. 3d DCA 1971), each of which makes it clear that a belated opportunity to depose or interview a witness is no substitute for a Richardson inquiry. IF the trial court here had fulfilled his obligation to carefully scrutinize the circumstances of the state's non-compliance with the rules [see e.g. Kilpatrick v. State, 376 So.2d 386 (Fla. 1979)], and if the state had been held to its burden of demonstrating that the defendants were not prejudiced in their ability to prepare for trial [see e.g. Cumbie; McClellan; Brey], then perhaps the trial court could have exercised his discretion to rule as he did. See Cooper v. State, supra 336 So.2d 1133; McClellan v. State, supra, at 878-79; Wendell v. State, supra, at 1169. Absent that inquiry, however, the trial court had no discretion to allow the state to introduce the testimony, or to decide upon an appropriate sanction for the discovery violation. In Brey v. State, at 398, for example, the court emphasized:

> Although the trial court has broad discretion in determining whether the evidence should be admitted, such discretion cannot be properly exercised in the absence of an adequate inquiry into the surrounding circumstances of the discovery violation. In addition to the three items set out above,[34] such an inquiry should also determine whether there are reasonable means available to avoid prejudice to the defendant and what sanctions, if any, including the possible exclusion of the evidence, should be imposed as a result of the violation. Cooper v. State, 377 So.2d 1153 (Fla.1979); Wilcox v. State, 367 So.2d 1020 (Fla.1979); Cumbie v. State, supra.

[34] I.e., whether the violation was willful or inadvertent; whether it was trivial or substantial; and whether it prejudiced the defendant's ability to properly prepare for trial.

See also Wilcox v. State, 367 So.2d 1020, 1023 (Fla.1979), in which this Court said "Once it has been ascertained whether the discovery violation hindered the defendant in his preparation for trial, the court must consider the nature of the violation in fixing upon a just sanction.[35] Prejudice may be averted by the simple expedient of a recess to permit the questioning or deposition of witnesses having knowledge of the statement. Absent a Richardson inquiry, the [trial] court is left to speculate as to the proper course to pursue."

Among the numerous Florida decisions which recognize that, until he has conducted a Richardson inquiry, the trial court cannot properly exercise his discretion to determine what sanction,, if any, is appropriate are Richardson itself; McCullough; Wendell; Clair; McDonnough; Boynton v. State, 378 So.2d 1309 (Fla. 1st DCA 1980); McClellan; and Salamone. See, especially, Neimeyer v. State, 378 So.2d 818, 821 (Fla. 2d DCA 1979), and Donahue v. State, 464 So.2d 609, 611 (Fla. 4th DCA 1985). In Donahue, the appellate court emphasized that, where the trial court failed to conduct a Richardson inquiry, "We are not concerned with the admissibility of evidence. Rather, we must determine whether the trial court is obligated to engage in a prescribed fact-finding process before determining whether a party may use undisclosed evidence." The court continued:

> Florida courts have consistently held that a Richardson hearing is an indispensable prerequisite to determining the admissibility of undisclosed evidence. Indeed, a strong argument can be made for the proposition that the Supreme Court's decision in Cumbie v. State, supra, precludes any exception to Richardson. And if this were not the case, we still would not alter the existing rule. The requirement to hold a Richardson hearing reinforces the discovery rules and encourages full compliance. It would be counter-productive to disregard the cause of a discovery violation. Whether it results from deliberate noncompliance or mere negligence is a significant distinction which should be considered. Moreover, fairness dictates that a trial court evaluate the impact of a discovery violation and take whatever steps are necessary to prevent irremediable prejudice.

[35] This Court inserted a footnote at this point, and said "It should not be forgotten that the discovery sanctions are designed in part to deter willful discovery violations. See Fla.R.Cr.P. 3.220(j)(2)."

> We see no reason to change a procedure that works. Therefore, we decline to create an "impeachment exception" to the Richardson rule. Instead, we opt for its uniform, consistent application to all phases of the trial. Since the court in the case at bar failed to conduct the required hearing, defendant's conviction and sentence are reversed and the cause is remanded for a new trial.

Donahue v. State, supra, at 611-12.

See also Smith v. State, __So.2d__ (Fla.1986) (Case Nos. 67,772 and 67,773, opinion filed December 24, 1986), in which this Court recently reaffirmed its adherence to the principles of Richardson,[36] and said:

> First, from a practical perspective, the rule of Richardson and its progeny works effectively and accommodates the various competing interests. The command of Rule 3.220(a) is simple, clear, and direct. The state is required to disclose and provide discovery. If the state fails to discharge its duty in this regard, the trial court must inquire into the circumstances of the discovery violation and its possible prejudice to the defendant. This process contains enormous flexibility by providing a full panoply of remedies which a judge may apply if a discovery violation has occurred, including, if the evidence warrants, finding no prejudice or "harmless error" and proceeding with the trial.
>
> We see no evidence that the clear dictates of this integral component of Florida law have imposed any significant hardship on the bench or bar or that it has worked any injustice. On the contrary,the requirement that a trial court merely listen and evaluate any claim of prejudice accompanied by the minor delay which most hearings or inquiries will impose on a trial is more than justified by the assurance of compliance with our rules and requirements of due process. [Emphasis in Court's opinion].

In the present case, undersigned counsel for appellant would submit that the most obvious explanation for the trial court's utter failure to conduct any inquiry into the state's breach of the discovery rules is that he simply didn't listen to the objection, apparently because he was still preoccupied with chewing out the defense attorneys over the earlier objection, for not filing a motion to compel. That is a straightforward and probably somewhat risky statement, but undersigned counsel believes the record bears it out (T.496-98). The trial court, believing

[36]The Court also pointed out that it had done so "repeatedly and consistently" in prior decisions, such as Cumbie; Wilcox; Smith [372 So.2d 86]; Kilpatrick; and Cooper [377 so.2d 1155].

as he did that the assistant state attorney had violated no rule nor obligation, clearly did not think he had any discretion to do anything but permit Claude Smith to testify:

> But I know, Mr. Tobin, that you are exactly right. They should have filed [a motion to compel].
>
> And outside of this being a capital case I just absolutely have to tell you to go ahead and call your witness. And that's just too bad.

(T.498).

With respect to the "inadvertent or willful" and the "trivial or substantial" prongs of the minimal requirements of the Richardson procedure, all indications from the record make it appear that Mr. Tobin's conduct in violating the discovery rules (even if he did not understand that his withholding of the taped statement constituted a violation) was deliberate, or, at best, grossly negligent. Also, from all indications, the violation was a substantial one, since it involved (inter alia) the witness' change of his story from denying that he saw the assailants to claiming that he did see them exit the cell. The trial court, while unstinting in his criticism of defense counsel, never held the prosecutor's feet to the fire by requiring him to explain why he waited until the trial was in progress to inform the defense that the taped statement had been taken. See Wilcox v. State, supra, at 1022. Even if the violation had been unintentional, however, that would not have obviated the need for a full inquiry [see Gant v. State, 477 So.2d 17 (Fla. 3d DCA 1985); Wendell v. State, supra, at 1169; Neimeyer v. State, supra, at 821], nor excused the state from its burden of demonstrating that there was no impairment of the defendants' ability to properly prepare for trial. [Decisions recognizing that the burden of demonstrating, in the trial court, the absence of prejudice is on the state--and that without such a showing the challenged evidence cannot be admitted--include Cumbie v. State, supra, at 1062; State v. Alfonso, 478 So.2d 1119, 1112 (Fla. 4th DCA 1985); Clair v. State, 406 So.2d 109, 110 (Fla. 5th DCA 1981); Hill v. State, 406 So.2d 80, 81 (Fla. 2d DCA 1981); Wendell v. State, supra, at 1168-69; Brey v. State, supra, at 398. See, especially, McClellan v. State, supra, at 877; and Lavigne v. State, supra, at

179-80. In those cases where the trial court finds that the defense has not been prejudiced, the circumstances establishing non-prejudice must affirmatively appear in the record. Richardson v. State, supra, at 775; Poe v. State, 431 So.2d 266, 268 (Fla. 5th DCA 1983); Miller v. State, 403 So.2d 619, 620 (Fla. 5th DCA 1981); Boynton v. State, 378 So.2d 1309, 1310 (Fla. 1st DCA 1980); Neimeyer v. State, supra, at 821; Jones v. State, 376 So.2d 437 (Fla. 1st DCA 1979)].

In the present case, to the contrary, it is virtually certain that the defense did suffer procedural prejudice as a consequence of the state's discovery violation. [See e.g. Neimeyer v. State, supra, at 821 ("On the contrary, it seems to us that appellant was prejudiced by the tardiness of the state's disclosure" of expert witness' change of testimony); Waters v. State, 369 So.2d 979 (Fla. 3d DCA 1979).

In Wilcox v. State, supra, at 1023, this Court explained the concept of "prejudice" in the context of the discovery rules:

> [The state] misapprehends the nature of the prejudice Cumbie and Richardson seek to remedy. The purpose of a Richardson inquiry is to ferret out procedural, rather than substantive, prejudice. In deciding whether this type of prejudice exists in a given case, a trial judge must be cognizant of two separate but interrelated aspects. First, the judge must decide whether the discovery violation prevented the defendant from properly preparing for trial. In this case, had petitioner known what the officer was going to say, he might have successfully excluded the testimony before trial. At the very least, advance knowledge would have given petitioner time to gather rebuttal evidence. On the other hand, close scrutiny might have revealed that the statement had no bearing on petitioner's defense. Without a Richardson inquiry, the trial court was in no position to make an accurate judgement as to these possibilities.
>
> The second aspect of procedural prejudice deals with the proper sanction to invoke for a discovery violation. Subsections (j)(1) and (2) of Florida Rule of Criminal Procedure 3.220 authorize the imposition of a broad spectrum of sanctions, ranging from an order to comply, to exclusion of evidence, or even a mistrial. Once it has been ascertained whether the discovery violation hindered the defendant in his preparation for trial, the court must consider the nature of the violation in fixing upon a just sanction. ...

See Alfaro v. State, supra, at 1346 (Richardson rule was adopted to prevent scenario where defendant "is suddenly faced with critical evidence to which [he] has little or no opportunity to respond"); State v. Del Gaudio, supra, at 610 (prejudice engendered by tardy discovery response is extinguished when defendant is provided with discovery information and material "sufficiently in advance of the scheduled trial date" to allow an adequate opportunity to make use of the discovery information in the preparation of his defense); see also Neimeyer v. State, supra, at 821; Haversham v. State, 427 So.2d 400, 402 (Fla. 4th DCA 1983).

In the present case, as far as defense counsel knew, Claude Smith was not claiming to be an eyewitness to the assailants' exit from the cell, but he did see Frank Wise lift the blanket and look into the cell. If the state had promptly disclosed the tape recorded statement which had been obtained well in advance of trial by Lt. Lee, defense counsel would have known differently. The defense's strategy might have been changed. The defense's opening argument to the jury certainly would have been changed. Prior to Smith's changing his story, he appeared (from the defense perspective) to be only a mildly harmful witness, and in some ways actually a helpful witness (see T.300). Therefore, to the defense lawyers (who presumably had other cases and clients in addition to appellants, and a finite amount of time to prepare for trial) Claude Smith may have seemed a relatively low priority item in their preparations. It was clearly necessary for defense counsel to gather as much impeachment and rebuttal evidence as possible against Frank Wise and Herman Watson; and they were well-prepared, at trial, to present a great deal of both [see p.10-20, 27-31, 34-35 of this brief]. If the state had complied with the discovery rules, there might have been sufficient time for defense counsel to obtain impeachment evidence pertaining to Claude Smith, or evidence tending to rebut the story he gave in the taped interview (and subsequently at trial). At the very least, there might have been time to investigate these possibilities. See Wilcox v. State, supra.

Moreover, by waiting until after the trial had begun to mention the existence of the taped statement, Assistant State Attorney Tobin effectively limited

the range of remedial measures available to the trial judge. If, for example, Mr. Tobin had disclosed the taped statement on the Friday, or even the weekend, before trial (which still would have been a discovery violation under Rule 3.220(f); see Neimeyer), and assuming that this revelation would have come too late at that point to be of any use to the defense in preparing for trial (see State v. Del Gaudio, supra, at 610), one of the alternative sanctions available to the trial court (in the event that he found that the state's violation of the rules was not egregious enough to warrant exclusion of the witness) would have been a continuance. See Fla.R.Cr.P. 3.220(j); Wilcox v. State, supra, at 1023; State v. Del Gaudio, supra, at 610; State v. Bowers, 422 So.2d 9, 11 (Fla. 2d DCA 1982); State v. Plachta, 415 So.2d 1356, 1358 (Fla. 2d DCA 1982); State v. Lowe, 398 So.2d 962, 963 (Fla. 4th DCA 1981); Snow v. State, 391 So.2d 384, 385 (Fla. 2d DCA 1980); Allen v. State, 346 So.2d 1241 (Fla. 1st DCA 1977). By delaying disclosure until the trial was in progress, Mr. Tobin created the situation where the only way the trial court could grant a meaningful continuance would be to call a mistrial on his own motion.[37] That in turn would have opened a real can of worms, since it would have given the defense at least an arguable claim that the mistrial was brought about by the prosecutor's deliberate misconduct, and that re-trial was therefore barred by the Double Jeopardy Clause, Cf. Oregon v. Kennedy, 456 U.S. 667 (1982), which delineates the narrow circumstances under which prosecutorial misconduct which provokes a mistrial on the defendant's motion may give rise to a Double Jeopardy bar to re-trial.

Thus, if the state complains on appeal that exclusion of a witness' testimony is a "severe sanction" which should only be imposed in situtations where no other sanction would suffice to remedy the procedural prejudice [see e.g. State v. Bowers,

[37]Since, when a defendant objects to a discovery violation, he is not required to move for a continuance [McClellan v. State, supra, at 877; Lavigne v. State, supra, at 180; Johnson v. State, 312 So.2d 231, 233 (Fla. 2d DCA 1975); and since Rule 3.220(j) places the responsibility on the trial court to determine the appropriate sanction (specifically including "grant a continuance" and "grant a mistrial" as options) after a Richardson inquiry [see Wilcox v. State, supra, at 1023], a mistrial called under these circumstances would not have been at the defendants'request. See Oregon v. Kennedy, infra.

supra; State v. Plachta, supra; State v. Lowe, supra], it should be remembered that it was the prosecutor himself who effectively eliminated the only lesser sanction which might have sufficed.

The trial court's failure to conduct a Richardson inquiry is per se reversible error; it cannot be remedied by a post-trial or post-appeal hearing, and it cannot be written off as "harmless error" by an appellate court. Smith v. State, __So.2d__ (Fla. 1986)(Case Nos. 67,772 and 67,773, opinion filed December 24, 1986); see also Cumbie; Wilcox; Raffone; Alfaro; Donahue; McCollough; Poe; Clair; Wendell; McDonnough; Brey; Boynton; Neimeyer; McClellan. Even if the dissenting view had prevailed in Smith,[38] however, the error in this case would require reversal. The only thing "overwhelming" about the state's evidence against Troy and Brown is that it is overwhelmingly self-contradictory [see pages 8-36 of this brief, and Issue II, infra]. Justices McDonald and Shaw, dissenting in Smith, were of the opinion that "[t]he harmless error test is a rigorous standard that requires a court to find beyond a reasonable doubt that the error had no effect on the verdict. It also places the burden of showing the error's harmlessness on the state. [State v.] DiGuilio, 491 So.2d at 1139" (12 FLW at 13). The state, in the present case, could not and did not meet its burden of demonstrating in the trial court that its violation of the discovery rules caused no prejudice to the ability of appellants and their counsel to properly prepare for trial; and the state could not show on appeal that the error was "harmless", even if such a contention were cognizable under Florida law. See Alfaro v. State, supra, at 1346, in which the District Court wrote:

> The Florida Supreme Court has held, of course, that the district courts have no discretion and must order new trials under such circumstances without regard to the harmless error rules. Cumbie v. State, 345 So.2d 1061 (Fla.1977). Because of the critical nature of the evidence in question, we could hardly apply the harmless error rule to the facts of this case, even if we were authorized to do so.
>
> Accordingly, we reverse and remand for a new trial.

This Court, in this case, should do the same.

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[38] Smith was a 5-2 decision.

ISSUE II

BECAUSE THE STATE'S EVIDENCE OF APPELLANTS' GUILT IS SELF-CONTRADICTORY, AND BECAUSE MUCH OF THE CRITICAL TESTIMONY IS DEMONSTRABLY PERJURIOUS, THERE IS INSUFFICIENT "COMPETENT SUBSTANTIAL EVIDENCE" TO SUPPORT THE VERDICT AND JUDGMENT.

(Alternatively)

UNDER THE TOTALITY OF THE CIRCUMSTANCES, APPELLANTS' CONVICTIONS ARE FUNDAMENTALLY UNJUST, AND THIS COURT SHOULD EXERCISE ITS AUTHORITY TO GRANT A NEW TRIAL IN THE INTEREST OF JUSTICE.

(Alternatively)

THE QUALITY OF THE EVIDENCE IS INSUFFICIENT TO SUPPORT IMPOSITION OF THE DEATH PENALTY.

Rule 9.140(f) of the Florida Rules of Appellate Procedure sets forth the scope of review:

> The court shall review all rulings and orders appearing in the record necessary to pass upon the grounds of an appeal. In the interest of justice, the court may grant any relief to which any party is entitled. In capital cases, the court shall review the evidence to determine if the interest of justice requires a new trial, whether or not insufficiency of the evidence is an issue presented for review.

In Tibbs v. State, 397 So.2d 1120 (Fla.1981), however, this Court determined that the appellate courts of this state would no longer consider "evidentiary weight" as a ground for reversal. The Court defined weight of the evidence as "a determination of the trier of fact that a greater amount of credible evidence supports one side of an issue or cause than the other" Tibbs v. State, supra, at 1123. The Court further observed, "As a general proposition, an appellate court should not retry a case or reweigh conflicting evidence submitted to a jury or other trier of fact." Tibbs, at 1123. Rather, the concern on appeal is whether, resolving all reasonable inferences in favor of the verdict, there is "substantial, competent evidence to support the verdict and judgment." Tibbs at 1123.

In this appeal, appellant is not basing his argument on the fact that the state's evidence of guilt conflicts with the defense's evidence of innocence, nor is he relying on the fact that the state's key witnesses were heavily impeached on cross-examination. Rather, the issue here arises from the fact that the state's

evidence of guilt conflicts with itself. The testimony of the state's two "eyewitnesses", Frank Wise and Claude Smith, was in such hopeless and irreconcilable conflict that one or the other of them necessarily has to be lying. More importantly, the testimony of both Wise and Smith was inconsistent with that of the relatively neutral witnesses presented by the state (especially the medical examiner, Dr. Hamilton, and correctional officers Weiland and Blum), to the extent that it can be said that the state's own evidence strongly suggests that both Wise and Smith gave perjured testimony against appellants. Before highlighting the most critical of the internal conflicts in the state's evidence, it is necessary to clarify the relief appellant is seeking on this point.

(1) Appellant submits that, under the extraordinary circumstances of this case, it is impossible to resolve the conflicts within the state's evidence itself in such a way as to support the verdict. Consequently, there is a lack of substantial, competent evidence to support the verdict and judgment. See Huggins v. State, 453 So.2d 835 (Fla. 5th DCA 1984); rev. den. 456 So.2d 1182 (1984), which discusses and distinguishes Tibbs. Appellant therefore requests that this Court reverse on grounds of evidentiary insufficiency.

(2) In the event that this Court determines, contrary to appellant's above contention, that the internal conflict within the state's evidence creates only an issue of evidentiary weight within the meaning of Tibbs, appellant requests that this Court reconsider and recede from Tibbs, for the reasons stated by Justice Boyd in his dissenting opinion in that case.[39]

(3) Bearing in mind that a large part of the rationale behind the Tibbs rule is the deference which is traditionally accorded to the jury as the trier of fact, it is important to note that the jury's deliberations in this case were infected by improper and highly prejudicial communications in both the guilt and penalty phases. The most serious impropriety in the guilt phase deliberations went directly

[49]See also the concurring opinion of Justice Boyd in the original Tibbs appeal (337 So.2d at 792).

to the crucial issue of identification [see Issue III]. In addition, the jury was repeatedly exposed throughout the trial to the judge's caustic remarks directed at the defense attorneys; these comments in all likelihood subtly (or even not so subtly) conveyed to the jury an impression that the judge favored a guilty verdict [see Issue IV, adopting the argument in the brief of co-appellant Brown on this point]. Also, there remains to be considered the sandbagging tactics of Assistant State Attorney Tobin, as detailed in Issue I; even assuming (extremely arguendo) that this Court finds no discovery violation, or no objection, or that a Richardson inquiry was conducted, the Court may still agree that Mr. Tobin's conduct in the matter was less than exemplary, and contributed to the overall unfairness of the proceeding. Appellant therefore submits that, in the event that this Court is concerned about the irregularities which permeated the trial of this case, but determines (perhaps on procedural grounds) that they do not amount to independent reversible error, this Court can and should still consider the cumulative effect of the irregularities [see e.g. Carter v. State, 332 So.2d 120, 126-27 (Fla. 2d DCA 1976); Knight v. State, 316 So.2d 576, 578-79 (Fla. 1st DCA 1975)], coupled with the inconclusiveness of the state's evidence [see Collins v. State, 423 So.2d 516 (Fla. 5th DCA 1982)],[40] and determine that appellants' conviction of first degree murder is fundamentally unjust. Under such circumstances, this Court has the authority under Rule 9.140(f) to order a new trial in the interest of justice. This is a case in which that authority should be exercised.

(4) In the alternative and at the least, this Court should reduce appellants' sentence to life imprisonment, on the plain and simple ground that no man should be put to death on this kind of evidence. See Melendez v. State, __So.2d__ (Fla.

[40]In Collins (at 517), the appellate court determined that the defendant did not receive an essentially fair trial "because of the cumulative effect of improper prosecutorial comment in the final argument, the inconclusive nature of the evidence identifying Collins as the person who committed the robbery, and the totality of the circumstances of this trial." The conviction was therefore reversed for a new trial.

1986) (Case No. 66,244, opinion filed December 11, 1986) (Barkett, J., concurring specially); see also ALI, Model Penal Code Section 210.6(1)(f) (sentence of death shall not be imposed where evidence, although sufficient to sustain the verdict, does not foreclose all doubt respecting the defendant's guilt).[41]

To the extent that he is able, undersigned counsel will resist the temptation to make an appellate closing argument, and let the evidence in the record speak for itself. However, there are three major areas of self-contradiction in the state's case which require at least a brief discussion.

First, and most glaring, is the fact that, according to Frank Wise, there was nobody else in sight, or in the area of the B-Floor doorway, when Troy and Brown (supposedly) came out of the cell (T.346, 359-60, 363-64, 367, 371-73); while according to the 260-270 pound Claude Smith, he was standing about a foot away from Frank Wise when the assailants exited the cell (T.542,546). According to Wise, he decided to act as sort of a self-appointed "lookout":

> . . .when they came out of the cell, I looked this way and I looked that way and I didn't see no traffic, didn't see nobody, so I simply did this right here (indicating) on the strength that I knew them two dudes that come out of this cell. And I was letting them know that there wasn't nobody in the area to see them come out because I felt they had been doing something wrong.

(T.346).

Wise testified that Troy and Brown "passed by me and went downstairs to the barber shop." (T.348). Smith testified that he followed them down the stairs, into the shower area (T.536, 538, 543-44). And yet (except for the brief moment when Smith passed him in the hallway, on his way over to the "high side", several minutes before the inmates came out of the cell (T.346, 358-60, 363)), Wise never saw Smith.

Wise, for reasons of his own, was evasive on the question of whether it would have been conceivably possible for somebody else to have seen what he saw (see T.362-75); for example, if "someone [who] do not wish me to see them"

[41] See also the dissenting opinions of Justice Boyd in Riley v. State, 366 So.2d 19, 22-24 (Fla.1978) and Riley v. State, 433 So.2d 976, 982 (Fla.1983).

had been peeking around the corner or standing behind the wall at the time when he (Wise) had moved up between Cells 2 and 3 (with the intention of peeking into the cell (number 3) from which the sounds were coming) (T.373-74). At the time Troy and Brown came out of the cell, however, Wise was not between cells 2 and 3; he was back standing in the B-Floor doorway (T.375). And Wise testified very plainly that there was nobody standing there with him in the B-Floor doorway (T.363, 364, 367). If there had been anyone standing near the B-Floor doorway, Wise would have seen them (T.363).

Then there is the matter of the blanket. In his statement to investigators Sands and Lee, given the day after the stabbing, Smith said he saw a blanket draped over Cell B-3, and saw Frank Wise standing where the hallways intersect, where he (Wise) would be able to observe both the "low side" hallway containing Cell B-3 and the short connecting hallway leading to the "high side" (T.674). As Smith was leaving the floor, he saw Frank Wise go down and lift the blanket and look into the cell (T.674).

At trial, Frank Wise testified that he was curious and thought about lifting the blanket, but discretion got the better part of valor. He testified that he moved up between cells 2 and 3 (which, according to him, was the point when somebody perhaps could have seen him from behind a corner or wall without him knowing it (T.373-74)), and then caught himself--"But then, you know, by being in prison you just don't get involved in people's business" (T.345, 373-74). So, testified Wise, "I backed up and stood at the head of the steps" (T.345).

Claude Smith testified at trial that the only thing he saw Frank Wise doing was leaning up against the big blue steel door at the entrance to B-Floor (T.540-41, 546-47). Asked whether he saw Wise do anything else, Smith replied, "When I first turned around, yeah, he waved his hand. That was all" (T.547).

Essentially, the state's two main witnesses, by their Abbott and Costello efforts to make their stories jibe,, proved the falsity of each other's testimony.

One or the other of them necessarily committed perjury at appellants' trial. The testimony of state witnesses Dr. Hamilton, Sgt. Weiland, and Sgt. Blum, as well as Lt. Lee (who was called by both the state and the defense) powerfully suggests that both Wise and Smith were lying.

Dr. Hamilton, the district medical examiner and the state's first witness, stated his professional opinion that the victim, Earl Owens, probably received his injuries within a short time before he presented for medical treatment; probably within ten minutes (T.331-32, 338). Owens had sustained 62 stab wounds and slashes, along with 20 superficial cuts; which would have caused him to bleed profusely from penetrating and perforating wounds of the major organs (T.324-25). Dr. Hamilton's opinion was based on the fact that these wounds would have resulted in sufficient loss of blood internally to put the victim into a state of hemorrhagic shock within a short period of time (T.333). Dr. Hamilton testified that it was "highly unlikely" that there was a significantly longer lapse of time than ten minutes between the infliction of the injuries and the arrival of the victim for medical treatment (T.331-32, 338-39). He said:

> If one were to present incontravertable proof that those injuries were received as long as a half hour before, I would say its not impossible, but I would be very, very surprised.

(T.332).

The testimony of Frank Wise and Claude Smith can hardly be characterized as "incontravertible proof" when the two of them contravert each other. Moreover, the time sequence of the incident as described by Wise and Smith is not only contraverted by the professional opinion of the medical examiner, but also by the testimony of the various correctional officers, the dying declaration of the victim, and even by a common sense evaluation of how long it takes to do things.

Frank Wise testified--indeed, insisted--that the events which he observed on B-Floor took place shortly before 5:00 o'clock. (T.343, 350, 353, 419). In contrast to the bulk of his testimony, he was not at all evasive about this. Wise was positive that it was before 5:00 o'clock that the assailants came out of the cell (and a

fortiori that it was before 5:00 when the victim was stabbed) for several reasons. First of all, Wise "knew it was around 5:00 o'clock because the whistle blows every afternoon at exactly 5:00. And I was there a few minutes before 5:00 before the whistle had blown" (T.343, see T.350, 419). The whistle, according to Wise, is "the big whistle in UCI and you can hear it all over the compound" (T.350); its function is "so you know what time to go for work and what time to get off from work" (T.350). Wise was unable to say what time he saw Larry Troy in the barber shop,[42] but he testified, "[W]hen I left B-Floor, the whistle blew shortly afterwards" (T.353). The sequence of Wise's activities, self-described, was as follows: he left B-Floor (T.353); the 5:00 o'clock whistle blew (T.353); he went to change his clothes to get ready for college (T.348, 353); he had to wait in line for about ten minutes to get his clothes because they had a long line (T.353-54); he then returned to his cell (on G-Floor) to put the clothes on (T.354, see T.342-43); after which he went to A-Floor and stopped by the barber shop (T.348, 354). At the barber shop, Larry Troy asked Wise for a cigarette (T.348, 354). Wise handed out a cigarette to Troy and one to another inmate who asked him for one; Wise then "left and went around to buy me another pack so I could go to college that night" (T.348). He then went to the area by the Main Housing Unit gate to leave for his class (T.352-53). When he first looked at the clock by the office area near the gate, it was five or ten minutes to six (T.353).

In addition, Wise testified that the clothing room opens at 5:00 o'clock, or sometimes a little after 5:00; "[b]ut it is supposed to open up at 5:00 o'clock" (T.350). At the time the incident occurred on B-Floor, Wise testified, the clothing room had not yet opened (T.351). After he left the floor and heard the whistle blow, Wise went to the clothing room (T.348, 353-54); by then it was after 5:00 (T.351).

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[42] In his deposition, Wise had said he saw Troy in the barber shop "somewhere around 5:30" (T.651-52, see T.354-55); which is consistent with the sequence of activities Wise described at trial (see T.348-54).

Claude Smith testified that he (and Wise) were on B-Floor "[a]bout a couple of minutes after 5:00. I can't verify what time exactly it was. But they had already started feeding the last meal"[43] (T.500). On cross-examination, Smith was asked if it wasn't true that he was on B-Floor at 4:00 o'clock instead of 5:00. Smith answered "I went up at 4:00 o'clock and then I went up at 5:00 o'clock" (T.552). Asked whether he'd only told Lt. Lee on the tape [see Issue I, supra] that he went up at 4:00 o'clock, Smith replied that he might have had the time wrong (T.552):

> MR. SALMON: Isn't it true, Mr. Smith, that the time you were up there when you saw this it was 4:00 o'clock?
>
> CLAUDE SMITH: I can't say exactly the time.
>
> Q. Isn't it true that that is what you told Lieutenant Lee?
>
> A. I was just guessing at the time then.
>
> Q. 4:00 o'clock?
>
> A. I was guessing at the time because it was just about 5 or 10 minutes--I can't say exactly how long they had been into the evening meal.[44]

(T.557).

On re-direct, Smith testified that he was not wearing a watch that day, but whatever time he was on the floor, that was when the incidents happened (T.556).

It is patently clear, then, that if Earl Owens received his 82 stab wounds at 5:30, or approximately 5:30, then Frank Wise, by his own testimony, wasn't there to hear it, or to see the assailant or assailants come out of the cell. And if Wise wasn't there, then Claude Smith wasn't there either. Yet the state's own witnesses--Hamilton, Weiland, Blum, and Lee--gave testimony which shows to a virtual certainty that the stabbing occurred at or approximately 5:30.

To begin with, there is Dr. Hamilton's expert testimony that in all probability Owens received his injuries within ten minutes of the time he presented for medical help, and that it would take "incontravertible proof" to convince him that the injuries could have been sustained as long as half an hour before. According to the incident report filed by Sgt. Blum, who was the first officer to see the injured

[43] According to Sgt. Weiland, who was called by the state as a rebuttal witness, in July 1981, feeding started at approximately 4:30 or 4:45 (T.804-05).

[44] See n.42, supra.

inmate (who was bleeding so profusely that it looked like somebody had dumped a bucket of red paint on him) come though the east grille court gates and sit down on the bench, the approximate time of this event was 5:45 p.m. (T.522-23). At trial, Sgt. Blum testified that the mess hall closes at about 5:45, and he saw the injured inmate toward the end of the evening meal, so it would have been between 5:30 and 5:45 (T.523). Within minutes, on Sgt. Blum's orders, the victim was rushed to the clinic on a three-wheel pushcart stretcher (T.524-26).

Lt. Lee and Sgt. Weiland were in Lee's office when they were notified that there was a seriously injured inmate at the clinic (T.586, 605, 614). Lee testified that in this type of situation, under normal procedures, he would be contacted quickly; usually within the first three minutes of when the inmate was started on his way to the clinic (T.590-91). Lt. Lee testified that, in this case, he received the call between 5:40 and 5:45 p.m. (T.586). Weiland testified that he looked at his watch to verify the time the call was received, and to the best of his recollection it was 5:45 (T.614, 807).

Lee and Weiland immediately went to the clinic to speak with Earl Owens. Owens was saying repeatedly that he was dying and that he couldn't breathe (T.606, see 587), but he was able to communicate understandably (T.587, 618-19). In response to Sgt. Weiland's questions, Owens told him "Two blacks stabbed me. One tall and slender, one short and slender (T.606-07, 615-16). Owens was unable to say where his assailants worked, because he apparently did not know this (T.617). But he was able to tell Weiland that the stabbing occurred in Cell B-3 of the Rock, and that he had made his way from the cell to the bench in front of the Main Housing Unit office (T.617).

Lt. Lee, recalled as a defense witness, testified that he took a deathbed statement from Owens (T.672). He was asked:

> In that statement, did he give you a time that the stabbing occurred?
>
> LT. LEE: Yes, sir, he did.
>
> Q. What time was that?
>
> A. He said it was approximately 5:30.

(T.672).

Dr. Hamilton's professional opinion that there was a ten minute interval between the time Earl Owens was stabbed and the time he presented for medical treatment is completely consistent with Owens' dying declaration that he was stabbed at about 5:30; completely consistent with Sgt. Blum's testimony that it was between 5:30 and 5:45 when he saw Owens--covered with blood--come through the gate and sit down on the bench; and completely consistent with Lt. Lee and Sgt. Weiland being notified between 5:40 and 5:45 that Owens was at the clinic. All of the above evidence is thoroughly inconsistent with the testimony of Frank Wise and Claude Smith. Under Wise's version, he was on B-Floor hearing the murder occur and watching the perpetrators make their exit before 5:00 o'clock; he was positive of this because of the blowing of the whistle, the opening of the clothing room, and the various things he had to do before arriving at the gate to go to college at five or ten minutes to six. In fact, were it not for the fact that Wise's testimony cannot be believed at all, he could almost be considered an alibi witness for Larry Troy, since he claimed to have stopped by the barber shop and seen Troy at some point after he (Wise) left B-Floor, heard the whistle, went to get a change of clothing, waited in line for about ten minutes, returned to his cell on G-Floor, and changed clothes.[44]

Claude Smith (who, by his own testimony, had to be on B-Floor at the same time as Wise, since Smith claimed they were standing a foot apart when appellants came out of the cell) was more flexible than Wise. He was there at a little after 5:00, or 4:00, or both 4:00 and 5:00, or when it was five or ten minutes into the evening meal (T.540, 551-52, 557), or "whatever time that was, that was the incidents that were occurring" (T.556).

Claude Smith also testified that when the two black inmates came out of the cell, he followed them down the stairs into the shower area (T.536, 538, 543-44); then he started back upstairs and encountered the white inmate who had

[44]In his deposition, Wise said he couldn't give a specific time when he saw Scuffy Ray (Troy) in the barber shop, but it was "somewhere around 5:30" (T.651-52).

been stabbed, who was staggering but was already halfway down the steps (T.538, 544-46). According to Smith's testimony, he physically helped the victim walk down the steps and to the bench (T.544-45); "[a]fter that the stretcher bearers took him over to the hospital" (T.544, see 538). Smith claimed, however, that he didn't get any blood on himself until afterward, when he went to go back upstairs and he touched the railing (T.544-45).

According to Smith, after he and the officers got the victim to the bench, he (Smith) "went and told Sergeant Blum that the two guys he was looking for had ran up in the shower area" (T.538).

Sgt. Blum, who was supervisor of the Main Housing Unit on the afternoon in question, testified that he was the officer who first noticed the injured inmate, and who immediately gave the order to get him to the clinic (T.520-21, 523-24). Sgt. Blum described what occurred as follows:

> I just came out of the mess hall. It was toward the end of the evening meal. I came out of the mess hall and walked into the office. And I was standing, looking out the west windows of the office when an inmate came through, it would be the east grille court gates. He was all red. It looked like somebody had dumped a bucket of paint over him.
>
> He walked down and sat on a bench in front of the office at the same time as I rushed out of the office, because I had noticed he had been wounded.
>
> So I got runners and an officer that was working the east exit door of the chow hall to escort this inmate to the hospital on a stretcher.

(T.520-21).

After getting the stretcher bearers to transport the injured man, Blum stepped into the office "for a split second" and told the clerk to send him an officer with the keys to the east side (T.521); and then he immediately went upstairs, following the trail of blood onto the second floor (B-Floor), and down to the third cell on the west side, where the blood stopped (T.521, 524).

Following the standard administrative procedure, Sergeant Blum filed an incident report concerning the above occurrence (T.522). In filling out an incident report, one tries to be as accurate as possible because the report may be reviewed

by someone in administration at some future date, and they don't want incorrect information (T.523). Sgt. Blum testified that he tried to be as accurate as possible in the incident report he filed in this case (T.523). In the incident report, Sgt. Blum put down the approximate time as 5:45 p.m. (T.523). He testified that he was gauging the time by the fact that it was toward the end of the evening meal, so it was between 5:30 and 5:45 (T.523).

Strikingly absent from Sgt. Blum's testimony is any mention of Claude Smith, or any mention of a heavy black inmate assisting the injured white inmate to the bench. More importantly, if Claude Smith had, as he testified, told Sergeant Blum "that the two guys he was looking for had ran up in the shower area", it defies credibility that Sgt. Blum would not have acted on this piece of information in some way. He would have gone to the shower area, or he would have dispatched other officers to the shower area. At the very least, he would have included in his incident report that Claude Smith claimed to know who the perpetrators were, and where they had gone; and he would have conveyed this information to Lt. Lee and Inspector Sands. Yet, as the record clearly indicates, nobody from the prison administration, or the D.O.C., or the State Attorney's office knew that Smith was going to claim to have seen the assailants until Lt. Lee took the tape recorded statement from Smith, at prosecutor Tobin's request, on or about June 1, 1983, less than two weeks before trial [see p.2-8 of this brief].

In addition to all of the foregoing, Frank Wise is an admitted perjurer, since he acknowledged that he gave materially inconsistent statements under oath (see T.382-86, 422, see T.648-52). There is ample evidence of bad blood between Wise and both appellants, especially Troy (see T.401-03, 406, 651, 750; R.359-62). There is reason for concern that Wise himself may have been involved in the murder--either as a "lookout" or as an active participant--and that his motive for testifying against appellants may have been to protect himself, or to protect his accomplices, or to protect himself from his accomplices.

The remainder of the evidence presented at trial does little or nothing to save the state's case from the fact that its two key witnesses were liars. Herman Watson's testimony, concerning one admission apiece supposedly made to him by Troy and by Brown, was virtually incoherent (T.431-491), and may well have been the product of the "noises" and "voices" which Watson has been hearing since 1981 (see T.458-61, 482-91, 685-87). Asked at trial whether it was the voices and noises in his head that caused him to make the statements about Larry Troy in this case, he allowed "...I have to say there is a possibility it had something to do with it" (T.487). [Watson also testified that the voices had him writing letters to Troy (T.485)]. If that is "competent, substantial evidence" to support a conviction of a capital crime and a death sentence, there is something radically wrong. As to the physical and/or circumstantial evidence, there wasn't much of it, and what there was was only tenuously connected with appellants, much less was it adequate proof of their guilt. A tennis shoe which may have been Willie Brown's (see T.508, 625-27) was found to have some "dilute bloodstaining" of unspecified type (T.570). This is undeniably consistent with somebody attempting to wash out the blood stains (T.540), but presumably it is also consistent with Brown (or his cellmate) getting cut playing basketball a week or a month earlier, and then some time later maybe getting caught in the rain, or walking through mud, or even (heaven forbid) deciding to wash his shoes. The partially burned shirt which correctional officer Anderson found in the "rock yard" appears somewhat more incriminating than the shoes, but it is hardly better connected to appellants. Anderson did not know who put the bucket in the yard, or how it got there, or when it was put there (T.509-10). He surmised that it would probably have only been there for a few days at the most, "because you have clean-up crews out there who usually clean stuff up" (T.509). Anderson had no personal knowledge as to when or whether such clean-up had actually been done (T.510). In July of 1981, there were four W. Browns at UCI (T.609). Sgt. Weiland interviewed three of these W. Browns (all except the co-appellant) and ascertained

that these individuals had their clothing "with full uniform assembly" (T.610). UCI laundry manager Donald Conner testified that his records showed that, as of August 3, 1981 (nearly a month after the crime), inmate Willie Brown, #022323, was missing a set of clothes (T.511-13). Conner had no personal knowledge of whether Brown was ever missing any clothing, or if it was hanging up in his cell (T.515-16). An officer would have come and made out a ticket; Conner would then re-issue a set of clothing, and his records would reflect accordingly (T.513-19). Connor agreed that it is difficult to keep track of inmate clothing, and that clothing is lost, stolen, or misplaced at the prison everyday in any number of different ways (T.514).[44a] Conner also testified that he supervises some inmate workers who do some of the "running around" (T.515).

The conflicts within the state's own case against appellants are so overwhelming and so irreconcilable that if this Court attempts to resolve them, and all reasonable inferences therefrom, in favor of the verdict, it will find that it cannot be done. There is no "competent, substantial evidence" to support the judgment and death sentence in this case. Appellant requests the relief set forth at p.72-74 of this brief.

[44a]The serologist Platt found some bloodstaining on the shirt but was unable to determine a blood type. He attributed this to the fact that "there is charring and scorched areas on the shirt" (T.567), and that blood and biological fluids are very susceptible to degradation by heat. The name and initial W. Brown, however, remained clearly visible on the shirt. Based on the likelihood that whoever burned the shirt (assuming that it has any connection to this case at all) was able to read, and was familiar enough with prison clothing to know that it carries the inmate's name, but probably didn't know that much about serology, one might reasonably ask whether the shirt is more consistent with Brown's guilt, or with an attempt by someone to set him up.

ISSUE III

THE TRIAL COURT ERRED IN DENYING APPELLANTS' PETITION FOR WRIT OF ERROR CORAM NOBIS[45]

Through the testimony of Sgt. Weiland, the state established that the victim, Earl Owens, said at the clinic, "Two blacks stabbed me. One tall and slender, one short and slender" (T.606-07, 615-16). According to Weiland, Owens told him that the stabbing occurred in Cell B-3 of the Rock, and that he had made his way to the bench in front of the Rock office (T.617). Weiland asked Owens where his assailants worked; Owens was unable to say where they worked, because he apparently did not know (T.617).

John Allen, a UCI inmate called by the defense, testified that he was acquainted with both Earl Owens and Larry Troy (T.739). Allen knew Owens well enough to consider him a friend; they used to talk and exercise together (T.739-40). Around noon on July 7, 1981, Allen and Owens went to the barber shop (T.740-41). Allen was having his hair lined up in the back, and he had a conversation with the barber, Scuffy Ray (Larry Troy) (T.741). Allen was doing most of the talking; Earl Owens and Troy may have exchanged a couple of words at the most (T.741). According to Allen, Owens had been to that barber shop on several prior occasions, and had his hair cut by Larry Troy (T.741). Allen did not think Owens would have known Troy by his given name, but he definitely would have known him as Scuffy Ray (T.742).

The state presented no evidence in rebuttal of John Allen's testimony; and the prosecutor's cross-examination of Allen reads, in its entirety, as follows:

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[45]The motions, orders, and memoranda of law which pertain to this issue are in the volume entitled "Record on Appeal" with the (erroneous) appellate case number of BP-274. This volume will be referred to as "R-CN". The transcript of the hearing which took place on July 23, 1986, is in the volume entitled "Transcript of Proceedings" with the same incorrect BP-274 case number. This volume will be referred to as "T-CN", and page reference will be to the page number in the upper right hand corner.

Due to the length of this brief, appellant will adopt much of his argument on this Point on Appeal. As to the various procedural arguments interposed by the state below, appellant adopts by reference his Response to the State's Motion to Dismiss with Prejudice (R-CN 18-44). As to instances of jury misconduct other than the two discussed in this brief, appellant adopts the argument contained in the brief of co-appellant Brown.

MR. TOBIN: Mr. Allen, when was the last time you saw Mr. Owens on that day?

A. When was the last time I saw Mr. Owens?

Q. Yes, sir.

A. I saw him around 11:30, a quarter to 12:00, maybe.

Q. You never saw him anymore?

A. No.

Q. Did you ever see Mr. Troy anymore that day?

A. No.

Q. So you don't know what happened between the two of them after 11:30?

A. No, sir.

(T.745).

At the hearing on appellants' petition for writ of error coram nobis, held on July 23, 1986, juror Anita Thomas testified that she voluntarily signed a sworn affadavit, and that the matters contained in the affadavit were accurate and true[46] (T-CN 79-81). She further testified, in pertinent part, as follows:

MR. SALMON: The information that you refer to in your affidavit, was that either in the form that it is in that affidavit, or in another form passed on to the members of the jury during their deliberations at some point?

JUROR THOMAS: Yes, sir.

Q. Did your mention of this information during the course of the deliberations of the jury in this case come up surrounding some issue that the jury was trying to resolve?

A. I don't remember exactly--I don't think I was the one that came up and said that a black inmate cuts black inmates' hair and vice versa. As far as I can remember, I did not say that, but somebody did say it and they asked me about it, because I worked out there, at RMC, and I told them as far as I have seen out there, that I have not seen a black inmate cut a white inmate's hair and vice versa.

Q. Okay. And that's the information that you provided to the other members of the jury during the course of their deliberations?

A. They asked me did I know of this happening at RMC and

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[46] Juror Thomas' affidavit, which was attached to the Request for Leave to File Petition for Writ of Error Coram Nobis filed in this Court by co-appellant Brown on or about February 17, 1985, states "I provided independent information regarding the victim's inability to identify the attackers during the deliberation phase of the trial. The information which I provided which did not come out of the courtroom was that a black barber cuts black inmates' hair and that a white barber cuts white inmates' hair. I was at that time employed by the Department of Corrections."

I said, "As far as I know, I have not seen a black inmate cut a white inmate's hair," and the other, vice versa.

THE COURT: You worked at RMC and the Defendants were at Union Correctional Institution.

THE WITNESS: UCI, yes, sir.

THE COURT: All right.

BY MR. SALMON:

Q. I believe my last question was this information that you provided to the jury, was it at a point during the deliberations where they were trying to resolve some issue?

A. I cannot remember.

Q. During the discussions of the matters, though, that the jury was deliberating on?

A. Yes, sir, it had to be. You know, something came up.

(T-CN 81-82).

Juror Thomas' forthright testimony was corroborated by juror Joanne Hendricks. Ms. Hendricks acknowledged that, during the jury's deliberations, one of the other jurors "provided some information concerning interaction that white and black inmates would have in prison" (T-CN 45). She did not recall who brought up the matter; when asked if it was Anita Thomas, she replied "Anita was working at the prison. It could have been" (T-CN 46).

MR. SALMON: What was the information, as you recall, that she provided?

JUROR HENDRICKS: We were talking about barbers.

Q. And what did she say?

A. That the barbers--something about the barbers on the--black men used black barbers and white men used white barbers

(T-CN 46).

Juror Hendricks had difficulty recalling exactly why the subject of barbers had come up--it seemed to her like it might have had something to do with the location of thevictim's cell in relation to the barber shop (T-CN 50-51)--but at one point she said:

Well, the victim's cell, it seemed to me like, was directly above or in the same unit or something with where the barber shop was and that's how it was brought up to where why didn't the white man know the black barber.

(T-CN 51).

Juror Hendricks did not recall a witness at trial by the name of John Allen (T-CN 52). She remembered the nickname of Scuffy Ray, but she did not recall in what context (T-CN 52).

Juror Deborah Taylor gave the following testimony:

> MR. SALMON: Ms. Taylor, between the two phases of this trial, that being the guilt phase and the penalty phase, did you have occasion to speak with your minister or pastor about the issues that the jury was considering?
>
> A. You mean after the trial was over?
>
> Q. Between the two phases. Perhaps when you were at recess between the guilt phase and prior to coming back to consider the penalty to recommend in this case.
>
> A. You're saying we've already said he was guilty...
>
> Q. Correct.
>
> A. ...and then before--between that time and when we came back for the death penalty or...
>
> Q. That is my first question,yes.
>
> A. Yes, I did talk to my pastor.
>
> Q. Why did you do that?
>
> A. The Judge said we could talk to anyone we wished about it.

(T-CN 71-72).

Ms. Taylor's pastor asked her how the trial had gone, and she told him "We found them guilty" (T-CN 72). She testified that she was not seeking the minister's advice on what penalty to recommend, and that he did not give her any advice on this (T-CN 72). When the subject came up about the death penalty or the life sentence, Ms. Taylor said "Well, you know, I'll pray about it. I don't know what--you know, the Lord is going to have to lead me in what I feel the answer would be" (T-CN 74). Her pastor told her to pray about it, "and whatever way the Lord guides for my decision" (T-CN 75). Asked whether she related this conversation to her fellow jurors, Ms. Taylor replied "I told them I had prayed about it and I got my answer" (T-CN 75). She did not recall if she told the other jurors that she had conversed with her minister (T-CN 75).

Asked whether the Biblical injunction that "he who lives by the sword shall die by the sword" came up in the course of her conversation with her minister,

Ms. Taylor answered "I don't believe so, but I don't remember" (T-CN 76).

Juror Florence Wilson (a witness who was extremely hostile to the defense, and who claimed that she signed her sworn affidavit without reading it (T-CN 21-39)) testified that the affidavit took her words out of context(T-CN 22, 25-26, 32, 38). In the affidavit, Ms. Wilson had said (or, in her view, was misquoted as saying) "One of the female jurors stated that she had spoken with her minister about which sentence to recommend. She stated that her minister told her "If you live by the sword, you die by the sword." She further stated that her minister told her that she should do what she felt is right. The woman said that she voted for the death penalty because after talking with her minister, she felt it was the right thing to do." At the July 23, 1986 hearing,Ms. Wilson testified that those were not the female juror's exact words, but rather they were her (Ms. Wilson's) paraphrasing of what the juror said (T.24-26, 38):

> MR. SALMON: Okay. You mentioned a phrase that is contained within that document referring to the Biblical phrase of, "He who lives by the sword dies by the sword."
>
> There was a statement made by another juror with respect to that matter during the course of the jury's deliberations?
>
> JUROR WILSON: She told us that she spoke with her pastor. Now, this was my way of describing what her pastor said, because I didn't remember exactly what she said.

(T-CN 24-25).

* * *

> Q. You simply recall that what she said was that she had spoken with her pastor?
>
> A. Right.
>
> Q. And from that you took what she said in your own mind to be that he who lives by the sword dies by the sword. Is that correct?
>
> A. That was my way of describing what he said. Now, he didn't literally use those words. That's why I say this is--those words are not exactly what the pastor said to her.
>
> Q. I understand.
>
> A. That was my description of what--more or less what he said, the context of what he had to say.
>
> Q. That is your description of what the other juror told you and the other jurors her pastor said to her?
>
> A. Yes.

(T-CN 26).

* * *

MR. TOBIN: And is it your position, as I have understood you to say to the Court, that you did not actually write out the affidavit?

A. No, I didn't.

Q. And it does not correctly state what you told Ms. Snyder.

A. No, not this. She used the words I said, but not in the way they were intended. I mean I substituted what the pastor told her.

(T-CN 37-38).

Appellant submits that the foregoing testimony amply demonstrates that his constitutional rights to a fair trial, to an impartial jury, to confrontation of adverse witnesses, and to have his guilt or innocence determined solely on the basis of evidence introduced at trial--were all irreparably compromised. See Durr v. Cook, 589 F.2d 891 (5th Cir.1979); United States v. Howard, 506 F.2d 865 (5th Cir.1975); Farese v. United States, 428 F.2d 178 (5th Cir.1970); United States v. Heller, __F.2d_ (11th Cir.1986) (39 Cr.L.2059); In re Stankewitz, __P.2d__ 220 Cal.Rptr. 382 (Cal.1985).[47] The inherently prejudicial nature of the improper outside influences which were brought to bear on the jury during the critical hours of both its guilt phase and penalty phase deliberations [see Livingston v. State, 458 So.2d 235 (Fla.1984)] was of such magnitude as to require a new trial, and, if necessary, a new penalty proceeding; and appellants' petition for writ of error coram nobis should have been granted. See Russ v. State, 95 So.2d 594, 601 (Fla.1957).

The constitution demands that the jurors determine the guilt or innocence of the accused solely on the basis of the evidence introduced at trial. See Taylor v. Kentucky, 436 U.S. 478, 485 (1978); Turner v. Louisiana, 379 U.S. 466 (1965); United States v. Howard, supra; Farese v. United States, supra. In the present case, juror Anita Thomas, an employee of the Department of Corrections, informed the other jurors (at their request, because they knew she worked at RMC and thus

[47]These decisions are quoted and discussed in appellants' response to the state's motion to dismiss filed below (R-CN 26-30).

was seen as something of an expert) that a black barber cuts black inmates' hair and a white barber cuts white inmates' hair. The state below grossly mischaracterized this as "Ms. Thomas' innocuous alleged sharing of general impressions she had acquired in the outside world with her partners in deliberation" (R-CN 14). General information? Outside world? Innocuous? In fact, Ms. Thomas related to the jury very specific information, acquired not in the "outside world", but within the very prison system (but not the same prison) as the murder for which appellants were on trial took place.[48]

The prejudicial impact of the out-of-court information conveyed to the jury by Anita Thomas is apparent. The victim, Earl Owens, a white inmate, was able to identify his attackers only as two black men, one tall and slender, the other one short and slender. Owens did not know where they worked. The state's two primary witnesses were Frank Wise and Claude Smith, both of whom claimed to have seen Troy and Brown exiting the victim's cell. Both Wise and Smith--especially Wise--were heavily impeached at trial. A defense witness, Noel White, also an inmate and also heavily impeached, testified that the persons who exited the cell were not Troy and Brown (whom he knew as Scuffy Ray and Bama), but two black males whom he did not recognize. According to Noel White, neither Wise nor Smith were in the vicinity when the two individuals came out of the cell. Another defense witness,

[48]If anything, this incident graphically illustrates why it is difficult, if not impossible, for an inmate accused of a serious crime to obtain a fair trial in Union County, where it is more likely than not that any given prospective juror will be a correctional officer, an employee of the Department of Corrections, or a close relative of one. In the present case, appellants moved for change of venue on the ground, inter alia, that the crime occurred at Union Correctional Institution, that the citizenry of Union County is largely composed of correctional officers and their families, and that the social and economic impact of the prison upon the County is enormous. Appellants also moved to disqualify correctional officers and former correctional officers from serving on the jury. These motions were opposed by the state, and were denied. Now, when a member of the jury who was an employee of the Department of Corrections did infect the jury's verdict by imparting extrinsic information--not introduced in court, and not subject to confrontation, cross-examination, or rebuttal --which had the effect of impeaching a key defense witness on the crucial issue of identification in a capital trial, the state complacently refers to this as "innocuous" sharing of "general impressions" acquired in the "outside world".

John Allen, also an inmate, testified that he knew both Earl Owens and Troy. Allen testified that he and Owens were in the barber shop around noon on the day of the murder; that Owens habitually got his hair cut at that barber shop; and that Owens would probably not have known Troy's given name, but definitely would have known him as Scuffy Ray. The obvious purpose of this testimony was to show that Troy was not one of the attackers, since if he had been, Owens would have been able to identify him as Scuffy Ray or as "the barber", rather than merely describing both assailants only by their race, height, and build. Allen's testimony was also helpful to Brown, because it tended to impeach the testimony of Wise and Smith (who claimed to have seen both Troy and Brown exit the cell), and tended to corroborate Noel White (who claimed that neither of the men who exited the cell was Troy or Brown).

The extrinsic information conveyed to the jury by Anita Thomas that "a black barber cuts black inmates' hair and a white barber cuts white inmates' hair" may well have been factually wrong,[49] but the defense never had an opportunity to cross-examine this juror-turned-witness, or to introduce evidence to rebut what she had put before the rest of the jury. See Durr v. Cook, supra, at 893-94; see also United States v. Howard, supra, at 867 ("While the thirteenth century jury may have been selected precisely because of its familiarity with background facts, this no longer fits our conception of the jury's role"). Whatever information the juror had, or thought she had, about the operation of the prison barbershops was in all likelihood based on nothing more than hearsay.[50] By informing the other jurors that, based on her observations working at RMC, a white inmate would not have had his hair cut by a black barber, the juror became, in effect, a crucial impeachment witness for the state. This "evidence", not received in court, not subject to

[49]Or it may have been true of RMC, but not true of UCI.

[50]Ms. Thomas stated on voir dire that her job at RMC did not involve any contact with prisoners (T.61). And even if it had, it is highly doubtful that she had any personal experience in the barber shop at RMC or UCI.

cross-examination to test its veracity, not subject to the introduction of contradictory evidence, may well have convinced the jury to disbelieve John Allen, and therefore erased what might otherwise have been a strong reason to doubt appellants' guilt. Where a juror on deliberation relates to other jurors material facts claimed to be within his personal knowledge, but which were not adduced at trial, and where the statements are such as would probably influence the jury, "the onus is not on the accused to show that he was prejudiced for the law presumes that he was." Russ v. State, supra, at 600-01. Here, the information conveyed by juror Thomas was inherently prejudicial, and it went to the heart of the defense, misidentification.

The right of an accused to a trial by an impartial jury "is fundamental and is guaranteed by the sixth amendment to the United States Constitution and Article I, Section 16 of the Florida Constitution." Livingston v. State, 458 So.2d 235, 238 (Fla.1984). "The right of a defendant to have the jury deliberate free from distractions and outside influences is a paramount right, to be closely guarded." Livingston v. State, supra, at 237. Thus, in Livingston, where the jury in a capital case was allowed, over objection, to separate over the weekend in the midst of its deliberations, this Court held that the trial court erred and that the error prejudiced the defendant's right to a fair trial. The Court reached this conclusion notwithstanding the fact that when the trial court allowed the jurors to separate, he cautioned them not read, view, or listen to news reports about the trial; and that when the jurors reconvened on Monday morning, the trial court asked them if they had discussed the case with anyone, or allowed it to be discussed in their presence, or read, seen, or heard any news reports. Each juror answered in the negative. Livingston v. State, supra, at 236. The Court rejected the suggestion that the error might be harmless:

> The reason for such a rule is of course, quite simply, to safeguard the defendant's right to a trial by an impartial jury. This right is fundamental and is guaranteed by the sixth amendment to the United States Constituton and Article I, section 16 of the Florida Constitution. There is no way to insulate jurors who are allowed to go to their homes and other places freely for an entire weekend from the myriad of subtle influences to which they will be subject. Jurors in such a situation are subject to being improperly influenced by conversations,

> by reading material, and by entertainment even if they obey the court's admonitions against exposure to any news reports and conversations about the case they have been sworn to try.

Livingston v. State, supra, at 238.

Quoting from State v. Smalls, 665 P.2d 384, 390-91 (Wash.1983), the court emphasized that jurors are "especially sensitive to prejudicial influence during deliberations."

In the present case, by way of comparison with Livingston, the issue is not merely the potential for the jury to be exposed to prejudicial outside influences, but the reality. In Russ v. State, supra, at 600, this Court observed:

> It is improper for jurors to receive any information or evidence concerning the case before them, except in open court and in the manner prescribed by law. 23 C.J.S. Criminal Law Section 1362, p.1022.
>
> Arguments of jurors should not be based on assertion of facts not in the evidence before them. Evidence to prove guilt may not be supplied by what a juror knows or believes independent of the evidence properly received in the course of the trial. The jury should confine their consideration to the facts in evidence as weighed and interpreted in the light of common knowledge. They must not act on the special and independent knowledge of any of their members.
>
> Where a juror on deliberation relates to the other jurors material facts claimed to be within his personal knowledge, but which are not adduced in evidence, and which statements are received by the other members of the jury and considered in reaching their verdict it is misconduct which may vitiate the verdict, if resulting prejudice is shown. 23 C.J.S. Criminal Law Section 1373.

The Russ Court also recognized that where the improper or extrinsic statements are by their very nature prejudicial, actual prejudice need not be demonstrated:

> If the statements by the juror are such that they would probably influence the jury, and the evidence in the cause is conflicting, the onus is not on the accused to show he was prejudiced for the law presumes that he was.

Russ v. State, supra, at 600.

If, on the other hand, the statements are improper but not inherently prejudicial, then actual prejudice must be shown. Russ v. State, supra, at 601.

In the present case, it can hardly be said that an average juror is entitled to conclude as a matter of "common knowledge" that a white prison inmate would

never go to a black barber. For that matter, "common knowledge" would not even tell a juror that a particular prison necessarily had any white barbers. What the jurors here were seeking out was the "special and independent knowledge" which they figured Anita Thomas had, since she worked at RMC (T-CN 81). The very fact that Ms. Thomas' presumed special knowledge of the demographics of the prison barber shops was specifically sought out by other jurors demonstrates that they were influenced in their deliberations by matters outside the evidence. The writ of error coram nobis should have been granted, and a new trial ordered.[51] See Russ v. State, supra, at 601. The trial court's order denying coram nobis relief should be reversed with directions to vacate the judgment and grant a new trial.

[51]With respect to the evidence regarding juror Debra Taylor's conversation with her minister, appellant would make the limited concession that it was within the province of the trial court to decline to find, from the conflicting evidence, that the words "If you live by the sword, you die by the sword" were spoken by the minister to the juror, or related by the juror to the jury. Nevertheless, the evidence unmistakeably shows that (1) Debra Taylor, contrary to the trial court's instructions, (see T.934 spoke with her minister about the death penalty and life imprisonment during the time between the guilt phase and penalty phase; (2) Debra Taylor communicated something about this visit to her minister to the rest of the jury during its deliberations on penalty; and (3) whatever it was that Debra Taylor told the jury about what her minister said, it was capable of being paraphrased by Florence Wilson as "If you live by the sword, you die by the sword." Appellant submits that this evidence of juror misconduct is sufficient to warrant a new penalty proceeding, although this contention will hopefully be rendered moot by the granting of a new trial based on the jury's consideration of juror Thomas' purported independent knowledge regarding the prison barbershops.

ISSUE IV

APPELLANT WAS DEPRIVED OF A FUNDAMENTALLY FAIR TRIAL BY THE TRIAL COURT'S REPEATED CHASTISEMENT OF THE DEFENSE ATTORNEYS THROUGHOUT THE COURSE OF THE PROCEEDINGS, BOTH IN AND OUT OF THE PRESENCE OF THE JURY.

Appellant Troy adopts by reference the argument contained in the brief of co-appellant Brown on this Point on Appeal.

CONCLUSION

Based on the foregoing argument, reasoning, and citation of authority, appellant respectfully requests that this Court reverse his conviction and death sentence and remand this case to the trial court for a new trial [Issues I, II, III, and IV]. In the alternative, appellant requests that this Court reverse his conviction and death sentence, and remand the case to the trial court with instructions to discharge appellant [Issue II, see p.72(1)]. In the alternative, appellant requests that this Court reverse his death sentence, and remand for imposition of a life sentence [Issue II, see p.73-74(4)], or for a new penalty trial before a new jury [Issue III, see p.95 n. 51].

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished by hand delivery to Assistant Attorney General John W. Tiedemann, The Capitol, Tallahassee, FL, 32301, and by U.S. Mail to Larry Troy, #022401, Florida State Prison, P. O. Box 747 , Starke, FL, 32091; Philip J. Padovano, Esquire, P. O. Box 873, Tallahassee, FL, 32302; and, Patrick D. Doherty, 619 Turner St., Clearwater, FL, 33516, this 28 day of January, 1987.

Steven L. Bolotin
Assistant Public Defender