IN THE SUPREME COURT OF FLORIDA

WILLIE A. BROWN, and LARRY TROY,	:	
Appellants,	:	
v.	:	CASE Nos. 64,802 64,803 69,427
STATE OF FLORIDA,	:	
Appellee.	:	
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ON APPEAL FROM THE CIRCUIT COURT
OF THE EIGHTH JUDICIAL CIRCUIT
IN AND FOR UNION COUNTY, FLORIDA.

REPLY BRIEF OF APPELLANT LARRY TROY

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REPLY BRIEF OF APPELLANT TROY

I PRELIMINARY STATEMENT

The state's brief will be referred to herein by use of the symbol "SB". Other references will be as denoted in appellant's initial brief.

This reply brief is primarily directed to the "procedural default" argument interposed by the state with regard to Issue I (discovery violation involving the tape recorded statement of Claude Smith). As to the remaining issues, and as to the substantive arguments regarding the discovery issue, appellant Troy will rely primarily on his initial brief.

IV ARGUMENT

ISSUE I

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

In addition to misrepresenting the facts[1/], the state is basically relying on yet another of its "the issue isn't preserved for appeal because defense counsel didn't have his tie on straight when he objected and moved for a mistrial" arguments. Citing Lucas v. State, 376 So.2d 1149 (Fla.1979) [a decision which is also discussed in appellant's brief, p.53, 57-59]; Cooper v. State, 336 So.2d 1133 (Fla.1976); Matheson v. State, ___So.2d ___ (Fla.1987) (12 FLW 67) [see appellant's brief, p.57, n.30a]; State v. Jones, 204 So.2d 515 (Fla.1967); and Henderson v. Kibbe, 431 U.S. 145 (1977), the state complains that defense counsel's objection[2/] to the prosecutor's violation of the discovery rules was insufficient to preserve the matter for appellate review. Incredibly, in view of the circumstances surrounding the acquisition of Claude Smith's taped statement by Mr. Tobin (through Lieutenant Lee), and Mr. Tobin's apparently deliberate non-disclosure of this critical development until after the trial had begun [see appellant's initial brief, p.3-8, 20-21, 44-47, 49-53,

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[1/] See p.14-17 of this reply brief.

[2/] 2/ Defense counsel's objection can be found at p.496-499 of the trial transcript, and is set forth and discussed in appellant's brief, p.53-59.

68-69], the state now has the audacity to accuse defense counsel of "the rankest form of sandbagging" (SB.39), for not objecting twice. Appellant does not disagree that rank sandbagging tactics were employed in this trial; but it was the prosecutor, Mr. Tobin, who was guilty of such tactics. See State v. Anders, 388 So.2d 308, 309, n.4 (Fla. 3d DCA 1980) (recognizing that the "gotcha!" doctrine applies to the state as well as to the defense).

The authority cited by the state does not even remotely support the manipulative "procedural default" argument[3/] by which it seeks to thwart review of the discovery issue in this case--an issue created by the prosecutor's bad faith conduct before and at trial.

Lucas v. State, supra, stands for the proposition that, in order to preserve a discovery violation issue for appellate review, defense counsel must interpose an objection. See Miller v. State, 403 So.2d 619 (Fla. 5th DCA 1981), and see, generally, Castor v. State, 365 So.2d 701 (Fla.1978). In the present case, defense counsel clearly did so (T.496-98). See Wilcox v. State, 367 So.2d 1020, 1022 and n.1 (Fla.1979); Miller v. State, supra, at 621.

Matheson v. State, supra, stands for the proposition that in order for a discovery issue to be cognizable on appeal, the specific legal ground must have been asserted by objection below. Compare Steinhorst v. State, 412 So.2d 332, 338 (Fla.1982) with Jackson v. State, 451 So.2d 458, 461 (Fla.1984), and see generally Spurlock v. State, 420 So.2d 875, 876-77 (Fla.1982); Thomas v. State, 419 So.2d

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[3/] Cf. Silverstein v. Henderson, 706 F.2d 361, 367-68, n.11 (2d Cir.1983).

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). In the present case, Troy's attorney objected to the testimony of Claude Smith, and asked the trial court to exclude Smith as a witness,[4/] on the specific 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 Lieutenant Lee (T.496-97). Defense counsel specifically asserted that the statement was not furnished on discovery (T.496); that the obligation to disclose it was "a continuing duty" (T.497) under the rules; and that "If he [Mr. Tobin] took a taped statement, we are entitled to see it. That's discovery" (T.497-98). Unlike the attorney in Lucas v. State, supra, defense counsel here did not defer to the trial court's misunderstanding of the law, nor did he waive or withdraw his objection. To the contrary, defense counsel made a specific and fully articulated objection to the state's violation of the discovery rules in failing to disclose the tape recorded statement it had obtained from the witness Smith; whereupon the trial court announced "I know good and well what the law is", and proceeded to rule adversely to appellants.

Cooper v. State, supra, stands for the proposition that the trial court has the discretion to remedy a discovery violation by means less drastic than outright exclusion of the witness. However, it is

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[4/] See Miller v. State, 403 So.2d 619, 621 (Fla. 5th DCA 1981), rejecting the state's contention that defense counsel is required to ask for something less than outright exclusion of the witness.

equally clear that such discretion cannot properly be exercised unless and until the trial court has conducted an adequate Richardson inquiry to ascertain whether, and to what extent, the complaining party has been prejudiced in its ability to prepare for trial, and to determine whether the violation of the rules was willful or inadvertent, and whether it was substantial or trivial. Cooper was distinguished on precisely this point in McClellan v. State, 359 So.2d 869, 878-79 (Fla. 1st DCA 1978), and Wendell v. State, 404 So.2d 1167, 1169 (Fla. 1st DCA 1981), which make it clear that the trial court does not have the discretion to order a lesser sanction as a substitute for a Richardson inquiry. Among the many decisions recognizing that the trial court cannot properly exercise his discretion to determine what sanction (including possible exclusion of the witness) is appropriate without conducting a Richardson inquiry are Richardson itself; Wilcox v. State, 367 So.2d 1020 (Fla.1979); Donahue v. State, 464 So.2d 609 (Fla. 4th DCA 1985); Clair v. State, 406 So.2d 109 (Fla. 5th DCA 1981); McDonnough v. State, 402 So.2d 1233 (Fla. 5th 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); as well as Wendell v. State, supra; and McClellan v. State, supra. As the Fourth District Court of Appeal observed in Donahue (at 611)[5/], when 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

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[5/]See also Smith v. State, 500 So.2d 125 (Fla.1986).

> fact-finding process before determining whether a party may use undisclosed evidence. 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 counterproductive 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.

In the instant case, when presented with appellant's objection to the state's violation of the discovery rules, the trial court did not engage in the fact-finding process prescribed by Richardson, or any fact-finding process at all. He simply overruled the objection. The trial court did not recognize that the state had committed a discovery violation,[6/] and it can plainly be seen from his comments[7/] that he did not think he even had any discretion to exclude

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[6/] Appellant will rely on his initial brief, p.40-53, to support his position that the prosecutor grossly violated his continuing discovery obligation in withholding from the defense, until the trial was in progress, the tape recorded statement which the state had obtained from Smith, in which he for the first time claimed to have seen the assailants exit the cell.

[7/] "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.498-99).

Claude Smith from testifying or to order a mistrial. So it is abundantly clear that, in the absence of any Richardson inquiry or any effort to determine the effect of the state's non-disclosure on appellants' ability to prepare for trial, the state's claim on appeal that the trial court acted within his discretion in selecting the meaningless "remedy" of allowing defense counsel (in the middle of trial) to listen to the tape must fail. Richardson; Wilcox; Smith; Donahue; Wendell; Neimeyer; McClellan.

As further "support" for its manipulative procedural default argument, the state points to footnote 12 of Henderson v. Kibbe, supra, 431 U.S. at 154. The issue in that case was whether the trial court's failure to instruct the jury, sua sponte, on the issue of causation was constitutional error requiring the granting of federal habeas corpus relief. Neither party requested a specific instruction on causation, or objected to the instructions which were given. The United States Supreme Court said:

> An appraisal of the significance of an error in the instructions to the jury requires a comparison of the instructions which were actually given with those that should have been given. Orderly procedure requires that the respective adversaries' views as to how the jury should be instructed be presented to the trial judge in time to enable him to deliver an accurate charge and to minimize the risk of committing reversible error. It is the rare case in which an improper instruction will justify reversal of a criminal conviction when no objection has been made in the trial court.12/

Henderson v. Kibbe, supra, 431 U.S. at 154.

Footnote 12 (which the state seems to think particularly relevant to the instant case) says this:

> In Namet v. United States, 373 U.S. 179, 190, 10

> L.Ed 2d 278, 83 S.Ct. 1151, the Court characterized appellate consideration of a trial court error which was not obviously prejudicial and which the defense did not mention during the trial as "extravagant protection." See Boyd v. United States, 271 U.S. 104, 108, 70 L.Ed 857, 46 S.Ct. 442.

State v. Jones, supra, cited by the state in support of its Alice in Wonderland argument that it has been sandbagged by appellants in this case, and that such behavior "should not be tolerated" (SB.39), is a case in which this Court, in the wake of Gideon v. Wainwright, 372 U.S. 335 (1963), announced that "henceforth [it would] review challenged argument of prosecutors only when an objection is timely made." [In Jones, defense counsel made no objection to the prosecutor's comments until after the jury had returned its verdict.] Jones, then, is simply an early articulation of the general principles of the contemporaneous objection rule--a rule which was fully complied with by defense counsel in the instant case (T.496-98). See Castor v. State, supra; Wilcox v. State, supra; Lucas v. State, supra; Matheson v. State, supra; Miller v. State, 403 So.2d 619, 621 (Fla. 5th DCA 1981); State v. Del Gaudio, 445 So.2d 605, 608-09 (Fla. 3d DCA 1984); Wortman v. State, 472 So.2d 762, 765-66 (Fla. 5th DCA 1985); Raffone v. State, 483 So.2d 761, 764 (Fla. 4th DCA 1986). These decisions (all of which, with the exception of Castor, deal specifically with discovery violation/Richardson inquiry issues) clearly establish what a defense attorney is expected to do if he seeks recourse in the trial court for a discovery violation committed by the state, or if he wishes to preserve the matter for review on appeal; he is to make an objection at trial, and he is to articulate the ground for his objection specifically enough to apprise the trial

court of the putative error and to permit intelligent review on appeal. Conversely, there is no requirement that he recite any particular "magic words" [see Jackson; Spurlock; Thomas; Williams, and Raffone v. State, supra, at 764], or that he request a lesser sanction [see Miller v. State, supra, at 621; McClellan v. State, supra, at 877; Johnson v. State, 312 So.2d 231, 233 (Fla. 2d DCA 1975)], or that he repeat his objection after the trial court plainly (and in no uncertain terms, see T.498-99) overruled it [see Spurlock; Thomas; Simpson v. State, 418 So.2d 984, 986-87 (Fla.1982); Brown v. State, 206 So.2d 377, 384 (Fla.1968)]. A proper objection triggers the mandatory requirement that the trial court conduct a Richardson inquiry [Wilcox, Lucas, Matheson, Miller, DelGaudio, Wortman, Raffone]; the trial court retains wide (though not unlimited) discretion to determine an appropriate remedy, but that discretion cannot properly be exercised until the trial court has undertaken a full and adequate fact-finding hearing into the circumstances of the discovery violation; most importantly, into its prejudicial effect on the aggrieved party's ability to prepare for trial. If a discovery violation has indeed occurred [see appellant's initial brief, p.40-53], and if it has been brought to the trial court's attention by a specific objection [see initial brief, p.53-59], then the trial court must conduct a Richardson inquiry before allowing the challenged testimony to be introduced [see initial brief, p.59-70]. If he fails

to do so, it is reversible error.[8/]

As the state correctly asserts, a defense lawyer is obligated to comply with the contemporaneous objection rule, and to make the grounds for this objection known to the trial court if he wishes to pursue the matter on appeal. See e.g. Castor v. State, supra. Basic fairness requires no less. State v. Jones, supra, 204 So.2d at 519. However, basic fairness also mandates that the defense lawyer be able to rely on consistent application of established law, so he will know what he needs to do to preserve an issue for appeal, and so that he will not be sandbagged by the state's propensity for advancing novel "procedural default" arguments on appeal. See e.g. Wright v. Georgia, 373 U.S. 284 (1963); Breest v. Perrin, 655 F.2d 1, 2-3 (1st Cir. 1981); Silverstein v. Henderson, supra, 706 at F.2d at 367-68, n.11. Here, defense counsel made his objection, and the grounds therefor, known to the trial court immediately before the prosecutor sought to call Claude Smith to the stand. The trial court plainly (and angrily) overruled the objection, and, without conducting a Richardson inquiry, ruled that the prosecutor "absolutely" could call his witness. [It is the failure to conduct the required inquiry when presented with a proper objection--not the admission of the testimony as such--which is per se reversible error. See, especially, Smith v. State, supra and Donahue v. State, supra, at 611-12]. The trial court, grudgingly,

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[8/] See Smith v. State, 500 So.2d 125 (Fla.1986), and the 33 other decisions cited at p.40, n.21 of appellant's initial brief, as a representative sample of the Florida caselaw which so holds.

requested the prosecutor to wait until the following morning to call Smith, so as to enable defense counsel to listen to the tape. The state's position on appeal seems to be that defense counsel should have repeated their objection the next morning, and that, by not doing so, they have waived appellants' objection to the discovery violation.

Were it not for the fact that appellants' lives depend on the proper resolution of this appeal, the state's argument would be unworthy of comment. First of all, defense counsel did precisely what the established law of this state directs them to do to preserve a discovery objection. [Castor; Wilcox; Lucas; Raffone; Wortman; Del Gaudio; Miller]. None of the cases cited by the state on appeal imposes any additional procedural requirement [Lucas; Cooper; Matheson; Jones; Henderson v. Kibbe]. Moreover, for defense counsel to have repeated their discovery objection the following morning would clearly have been an exercise in futility. See Spurlock v. State, 420 So.2d 875, 876 (Fla.1982); Thomas v. State, 419 So.2d 634, 635-36; Simpson v. State, 418 So.2d 984, 986-87 (Fla.1982); Brown v. State, 206 So.2d 377, 384 (Fla.1968); Birge v. State, 92 So.2d 819, 822 (Fla.1957). In Simpson (a case involving prosecutorial comment on the exercise of Fifth Amendment rights), for example, this Court held:

> Under these circumstances, where clearly a timely objection to the improper comment was made by defense counsel, and where the judge unequivocally and without hesitation overruled the objections, the issue of the admission of such testimony and comments before the jury is properly preserved for appeal. It is evident that a motion for mistrial at either juncture in the trial where defense counsel's objections were overruled would have been futile. To require such a motion would be to place form above substance and would seriously hinder the administration of justice. We should seek to avoid, not foster a hypertechnical application of the law.

* * *

> The reason for requiring the defendant to contemporaneously ask for a mistrial when his objection has been sustained does not exist when his objection has been overruled. In overruling his objection, the trial court determines that there was not an improper comment on the defendant's exercise of his right to remain silent. Having made that determination, there would be no basis for the trial court to grant a mistrial even if the defendant were to ask for one. At that point, the defendant, by his contemporaneous objection, has done all that he is required to do to bring the alleged error to the attention of the trial court. No purpose would be served by requiring a futile motion for mistrial after the trial court has already overruled the defendant's contemporaneous objection. In that situation, the objection is preserved, and if the defendant is convicted, it may be raised as a point on appeal.

Accord, Birge v. State, supra, at 822 ("it is certainly unnecessary that an accused undertake to accomplish an obviously useless thing in the face of a positive adverse ruling by the presiding judge").

In the present case, it would not only have been futile for defense counsel to have repeated their objection, but it would almost certainly have invited further verbal abuse by the trial judge. [See Point Six, at p. 37-41 of co-appellant Brown's initial brief, which has been adopted by Troy]. When presented with defense counsel's discovery objection to Claude Smith's testimony, the trial judge announced "I know good and well what the law is", and unequivocally ruled" . . . I just absolutely have to tell you [Mr. Tobin] to go ahead and call your witness. And that's just too bad" (T.498-99). The fact that defense counsel did not repeat their objection the following morning does not even remotely suggest, as the state speciously contends, that they were "satisfied" (SB>39) with the trial

court's erroneous ruling. A lawyer may not disregard a court order merely because he believes it to be erroneous [see e.g. Vizzi v. State, 501 So.2d 613, 619 (Fla. 3d DCA 1986); Rubin v. State, 490 So.2d 1001 (Fla. 2d DCA 1986); Wells v. State, 471 So.2d 620, 623 (Fla. 5th DCA 1985)]--nor is he required to repeat his objection in the face of a positive adverse ruling, at the risk of antagonizing the judge [Spurlock; Thompson; Simpson; Brown; Birge]. The remedy for an erroneous ruling is an appeal. Wells v. State, supra, at 623. The state sandbagged appellants below by deliberately withholding until the midst of trial the fact that Claude Smith had given a tape recorded statement, in which he changed his story and now claimed to have seen the assailants exit the victim's cell. Now the state, by use of similar tactics, is trying to deprive appellants of review, in this capital case, of the most critical and prejudicial error below. Appellants' position on the merits is so clearly correct that the state must resort to procedural gymnastics to try to preserve its tainted convictions. The state's approach amounts to this--whatever defense counsel might have done in this case to register his discovery objection, the state would have said he should have done something different. If defense counsel, in making his objection, says tomayto, the state comes back on appeal and complains that he should have said tomahto. An attorney--especially one representing a client whose life is at stake--has a duty to make his objections known to the trial court, but he also has a right to rely on the established caselaw in order to know what he must do to preserve his client's rights, and to avoid inadvertently waiving those rights. Trying a capital case is difficult enough, without putting defense counsel in the impossible

position--after he has made a contemporaneous objection--of having to anticipate what else the state might later say he should have done. The letter and the spirit of the contemporaneous objection rule require only that counsel bring the discovery violation specifically to the trial court's attention by means of a timely objection. Counsel in this case did so (T.496-97). This triggered the trial court's responsibility to conduct a Richardson inquiry, but he did not (T.498-99). Appellants convictions must be reversed for a new trial, Smith v. State, supra; a trial in which the element of surprise will be removed from the state's arsenal.

One additional matter must be addressed briefly. The state, at page 36-37 of its brief, makes the representation (though in an extremely indirect manner) that the tape-recorded statement of Claude Smith did not contain any statement by Smith that he had seen the assailants come out of the cell. Rather, the state suggests that this crucial information was "informally provided" to the state by Smith, apart from what he conveyed to Lieutenant Lee on the tape (SB.37). The state proceeds from this false representation to argue that since "an attorney is not required to inform the other side of new information he orally receives in preparing his witnesses for trial if he does not contemporaneously record it" (SB.37), therefore (according to the state), Mr. Tobin's conduct of withholding from the defense both the taped statement, and the so-called "other inculpatory information" obtained from Smith, did not violate the discovery rules (see SB. 37-38).

First of all, the state's representation that the tape

recording did not contain a statement by Smith that he saw the assailants exit the cell is absolutely false. [While, for the reasons which will be set forth, appellant believes a post-trial evidentiary hearing is totally inappropriate as a matter of law, and would serve only to further delay the new trial to which he and Brown are entitled, appellant is prepared if necessary to present the sworn testimony of attorney Bill Salmon (co-appellant's counsel below) that the tape recording did indeed contain Smith's statement that he saw the assailants come out of the victim's cell.] During his cross-examination of Smith, attorney Salmon asked the witness:

> 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.
> Q. Isn't it true, Mr. Smith, that you only went up on B-Floor at 4:00 o'clock, <u>that that is what you told Lieutenant Lee on the tape</u>?
> A. I might have had the time wrong.

(T.552).

* * *

> Q. Isn't it true, Mr. Smith, that the time you were up there when you saw this it was 4:00 o'clock?
> A. I can't say exactly the time.
> Q. <u>Isn't it true that that is what you told Lieutenant Lee</u>?
> 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.

(T.557)

Obviously, since Mr. Salmon cross-examined Smith about the inconsistency between his testimony at trial and what he had told Lt. Lee on the tape, it stands to reason that if Smith had neglected to mention to Lee on the tape the rather critical (purported) fact that

he saw the killers of Earl Owens come out of the cell, Mr. Salmon would have pointed out this discrepancy on cross.

However, the state's argument is not only based on fiction, it is also untenable as a matter of law. The state does not deny that it took a tape recorded statement from Smith; it merely contends that since (it says) the really devastating part of Smith's testimony was obtained, for some unknown reason, on the side, there was no harm done in the prosecutor's non-disclosure of the tape (see SB>37-38). In other words, though the state knows it cannot use the phrase, it is trying to make a "harmless error" argument--in fact, one very similar to that rejected by this Court in Smith v. State, 500 So.2d 125, 127 (Fla.1986). As has been repeatedly recognized by the appellate courts of this state, it is the function of a Richardson inquiry to determine whether, and to what extent, the complaining party has been prejudiced by a violation of the discovery rules. The trial court's failure to conduct a Richardson inquiry cannot be remedied by a post-trial or post-appellate inquiry, and it cannot be declared "harmless error" on appeal. See e.g. Smith v. State, supra; Cumbie v. State, 345 So.2d 1061 (Fla.1977); Wilcox v. State, 367 So.2d 1020 (Fla.1979); Donahue v. State, 464 So.2d 609 (Fla. 4th DCA 1985); Neimeyer v. State, 378 So.2d 818 (Fla. 2d DCA 1979); McClellan v. State, 359 So.2d 869 (Fla. 1st DCA 1978). Moreover, even assuming that the record were somewhat ambiguous (which appellant does not concede), it should be emphasized, as it was in Donahue v. State, supra, at 611, that the immediate purpose of the rule which mandates that a Richardson inquiry be conducted at trial "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." If the trial court had fulfilled his obligation in the present case, the record would undoubtedly be much clearer. But it is certainly clear enough, as is, to reveal that the state took a tape recorded statement from Claude Smith, and waited, perhaps as long as two weeks, until the trial was underway, before informing defense counsel of this fact. Regardless of what the specific contents of the tape might have been, this was unquestionably a violation of the discovery rules. Fla.R.Cr.P. 3.220(a)(ii); Balboa v. State, 446 So.2d 1134 (Fla. 3d DCA 1984); see also Cooper v. State, 377 So.2d 1153 (Fla.1979); Black v. State, 383 So.2d 295 (Fla. 1st DCA 1980). The prejudicial effect of the violation should have been ascertained when appellants made their objection at trial; prejudice cannot be determined on appeal, nor can it be determined nunc pro tunc by means of a post-trial hearing. Smith; Cumbie; Wilcox; Raffone; Donahue; Wendell; Brey; Boynton; Neimeyer; McClellan. The state's disguised harmless error argument (based on a false representation of fact) should be seen for what it is, and summarily rejected.

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.

If the facts set forth by the state (SB.11-14, 40-41) fairly, accurately, or completely reflected the evidence presented at trial, then it would be difficult to disagree with the state's conclusions of law drawn therefrom. Unfortunately, the state's statement of facts is neither fair nor accurate nor complete. Having refused to recognize, much less explain, all of the evidence to the contrary, the state expresses the opinion that "the testimonies of Wise and Smith were, in the main, consistent and also consistent with the remainder of the State's case" (SB.40); therefore, according to the state, appellant's legal argument is "interesting" but "wholly inapplicable to this case" (SB.40).

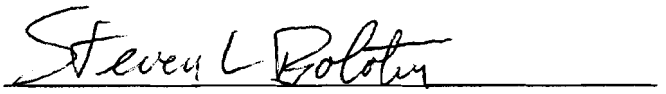
Appellant submits that the facts set forth in his initial brief, at pages 8-36 and 74-84, accurately reflect the evidence in this case. The state thinks otherwise. Consequently, this Court must look to the record itself to resolve the dispute, and to determine which, if either, version accurately portrays the evidence upon which appellants were convicted. Cf. Overfelt v. State, 434 So.2d 945, 949

(Fla. 4th DCA 1983). See Fl.R.App.P. 9.140(f). If the Court finds that the evidence at trial was substantially as presented in appellant's brief, then appellant requests the relief set forth at p.72-74 of that brief.

CONCLUSION

Based on the foregoing argument, reasoning, and citation of authority, and that contained in his initial brief, appellant respectfully requests that this Court reverse his conviction and death sentence and remand this case to the trial court for a new trial.

Respectfully submitted,



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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 Patrick D. Doherty, 619 Turner Street, Clearwater, FL, 33516, Philip J. Padovano, P. O. Box 873, Tallahassee, FL, 32302, and Larry Troy, Florida State Prison, P. O. Box 747, Starke, FL 32091, this 27 day of March, 1987.

Steven L. Bolotin
Assistant Public Defender