OA 5-24-88 Original

In the Supreme Court of Florida

Duane Eugene Owen,
(Appellant),

vs

State of Florida,
(Appellee).

Case Number
68,550

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On Direct Appeal from the Circuit Court of the Fifteenth Judicial Circuit of Florida In and For Palm Beach County

Supplemental Pro Se Brief of Appellant

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Request for Oral Argument of Appellant

The Appellant respectfully request that this Honorable Court hear oral argument by Appellant for the issues herein raised.

Respectfully submitted,

[signature]

Duane Eugene Owen #101660

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Preliminary Statement

Appellant was the Defendant and Appellee was the prosecution in the Criminal Division of the Circuit Court of the Fifteenth Judicial Circuit, in and for Palm Beach County, Florida.

In this brief, the Appellant will be referred to as he appears before this Honorable Court, and Appellee will be referred to as the State.

The symbol "R" will be used to designate the Record on Appeal.

The appendix will be used to fully understand the Record on Appeal.

Questions Presented

I. Whether the Trial Court erred in denying the motion to suppress Appellant's statements?

II. Whether Appellant was deprived of Due Process of Law and a Fair Trial by the State's Destruction of Evidence in violation of the Fifth and Fourteenth Amendments, Florida Law, and Notions of Basic Fairness?

III. Whether Appellant was denied his Sixth Amendment Right to the Assistance of Counsel for his Defense through the negligent and therefore Ineffective Assistance of Trial Counsel?.

Statement of the Facts

The facts are as follows:

On May 29, 1984, the Boca Raton Police Department issued a B.O.L.O. for the Appellant, Duane E. Owen, after his picture was identified from a photo-line up on an un-related case.

Later that day at approximately 10:30 AM on May 29th, 1984, officer K. Petracco from the B.R.P.D. stopped Appellant who was walking down the Street. The Officer justified the stop by stating that, "he generally fit the description of the picture I had." (R.633). Upon approach of the patrol car, Appellant did not attempt to flee, and when requested to produce identification, he exibited a driver's license. He was then arrested at the scene and taken into custody.

On March 24, 1984, Karen Slattery was found dead at 12:14 AM in the master bedroom of a residence in Delray Beach, Florida. Due to Appellant's arrest and an investigation by Boca Raton on a homicide that occured

in their city, the Boca Raton police summoned the detectives from Delray Beach.

While Appellant was in custody at the Boca Raton Police station, he signed two seprate rights forms reflecting the 29th day of May 1984. During that preiod, he requested a lawyer of his choice, and was still interrogated and detained by both Boca Raton and Delray Beach detectives for approximately 36 hours without being brought before a committing magistrate.

Appellant was taken to Palm Beach County Jail at 1:30 am on May 31, 1984. Later that day or on June 1st, Appellant was arraigned and appointed counsel to represent him. On June 1st, 1984, Sgt. Woods from Delray Beach and Lt. McCoy of Boca Raton traveled to the county jail to interrogate Appellant on all unsolved crimes in their cities. Both offices knew Appellant was arraigned. This interrogation lasted about 7 hours, however none of these officers attempted to record or preserve the conversations even though the room they were using was set up for videotaping. Subsequently they used the same room to record Appellant's conversations on videotape for over 20 hours. This was done without a warrant and the videotapes were not sealed.

Since Appellant was selectively recorded and the officers testified to only 20 hours of videotape,

And it was well established that Appellant was interrogated well over 90 hours, it cannot be said that all conversations were recorded or what was said during those interrogations.

However during those interrogations, Appellant continued to request a lawyer of his choice and in the latter part of the videotapes, appellant twice indicated his desire to remain silent.

> Appellant: I rather not talk about it. (R.3000)
>
> Appellant: I don't want to talk about it. (R.3018)

During trial, the Court precluded Appellant's Attorney's from cross-examining a Detective called by the State concerning information concerning another suspect in this case, and further due to Appellant's counsels lack of investigation, Appellant was denied effective assistance of counsel.

On October 18, 1985, the jury returned a verdict of guilty and on November 7, 1985, the jury returned a vote of eleven to one (11-1) recommending the death penalty. On March 13, 1986, the trial Court sentenced Appellant to death, thus giving rise to this instant appeal.

Summary of the Argument

From the moment of Appellants detention and arrest, through the pronouncement of the sentence, Duane Eugene Owen, was denied a fair trial in violation of Due Process.

Appellant was denied his request for a lawyer of his choice from May 29th 1984, and this request was repeated throughout the interrogations, but Appellant was denied the opportunity to have a lawyer present by the various police officers. Therefore, all statements taken were in violation of the Fifth and Sixth Amendment to the United States Constitution as interpreted by the Supreme Court in Miranda v Arizona, 384 U.S. 436 (1966), Edwards v Arizona, 451 U.S. 477 (1981) and Rhode Island v Innis, 466 U.S. 289 (1980).

The Statements are further tainted by the unlawful stop and detention of Appellant. Brown v. Texas, 433 U.S. 47 (1979) and Wong Sun v. United States, 371 U.S. 471 (1963).

Appellant was further interrogated even after appointment of counsel at arraignment. Miranda, supra, Michigan v Jackson, — U.S. —, 106 S.Ct. 1404 (1986), and United States ex rel. Espinoza v Fairman, 813 F.2d 117 (7th Cir 1987). During these interrogations, appellant was videotaped without his knowledge or consent in violation of his Fourth Amendment Rights and Article 1, section 12 of Florida Constitution and Florida Statute §934.09 against search and seizure.

Appellant was videotaped in excess of 20 hours of interrogations, however it is reflected that Appellant was interrogated over and beyond 90 hours, all of which cannot be accounted for, thereby violating his rights to due process as guaranteed by the United States Constitution, Florida Constitution, and Brady doctrine under Brady v. Maryland, 373 U.S. 83 (1963).

Appellant was still interrogated even after his request to remain silent (R.3000-3018). Miranda, supra, and Christopher v. State, 1 FLW Fed. C1099, (11th Cir. Sept. 4, 1987)

Lastly, Appellant was denied his Sixth Amendment right to the assistance of counsel for his defence through the negligent and therefore, Ineffective Assistance of Counsel. Strickland v Washington, - U.S. -, 104 S.Ct. 252 (1984) and Knight v. State, 394 So 2d 997 (Fla. 1981).

In light of the foregoing, not only must the Appellant's sentence be vacated, but the conviction and judgement must be set aside with direction to suppress the videotapes and a new trial with a new impartial trial judge.

I. The Trial Court Erred in Denying the motion to Suppress Appellant's Statements

Normally, it is the settled law of Florida that a trial Court's Ruling on a motion to suppress is clothed with the presumption of correctness on appeal, and the reviewing court should interpret the evidence and reasonable inferences and deductions derived therefrom in a manner most favorable to sustaining the trial court's ruling. McNamara v. State, 357 So 2d 410, 412 (Fla. 1978). However, in the instant case, the trial judge at the motion to suppress hearing went at length in great detail what the effect would be on the State's case should the motion be granted. (R. 1264-72). The prosecutor even stressed her discomfort with the Judge's inquiry.

> I am a little uncomfortable with you asking those questions, because I am sure - I guess maybe because I don't understand why you are asking the questions. I am not sure that that is a relevant consideration as to whether or not the motion should be granted or not. (R. 1266),

The State's obvious concern was that the trial judge was going to base his ruling, not on the law, but rather on

the effect to the State's case. This is totally improper and nulifies the presumption of correctness by which the ruling has come before this court.

A. The police totally lacked a well-founded suspicion to stop and seize the Appellant which amounted to an illegal investigatory stop.

Appellant was stopped while walking down the sidewalk at approximately 10:30 AM on May 29th, 1984, by a Boca Raton police officer who was acting on a photograph which looked similar to the Appellant. Upon the approach of the patrol car, Appellant did not attempt to flee, and when requested to produce indentification, he produced a driver's license. There existed no suspicious activity on Appellant's part, yet he was further detained and subsequently arrested.

In a case whose facts are quite similar, Brown v. Texas, 443 U.S. 47, 99 S.Ct. 2637 (1979), the United States Supreme Court was confronted with a situation where the arresting officers observed two men in an alley and upon approach of the officer's patrol car, the two men separated and walked away. The officers stopped Brown because the situation "looked suspicious and we had never seen that subject in the area before". There was no claim of specific misconduct nor was there any

reason to believe he was armed.

The United States Supreme Court in the Brown case stated:

"when the officers detained Brown for the purpose of requiring him to identify himself, they performed a seizure of his person subject to the requirements of the Fourth Amendment....

The Fourth Amendment of course, applies to all seizures that involve only a brief detention short of traditional arrest." (cites omitted).

... The Fourth Amendment requires a seizure must be based on specific, objective facts indicating that society legitimate interests required the seizure of the particular individual, or that the seizure must be carried out pursuant to a plan embodying explicit, neutral limitations on the conduct of the individual officers." (cites omitted).

"In the absence of any basis for suspecting appellant of misconduct the balance between the public interest and appellant's rights to personal security and privacy tilts in favor of freedom from police interference."

This Court in Mullins v. State, 366 So 2d 1162 (Fla. 1978), "that riding a bicycle through a residential area in the early morning hours was, clearly insufficient to give rise to anything

more than a bare suspicion of illegal activity." At 1163. Also in; Coladonato v. State, 348 So 2d 326 (Fla. 1977), ruled that "driving a van with out-of-state plates at 7:30 AM, in a business district did not give rise to founded suspicion of illegal activity". Id. Both Mullins and Coladonato are dispositive here.

Appellant in this instant case was stopped walking down the street, did not appear to be nervous, all of which did not justify an investigatory stop. See: State v. Levin, 452 So 2d 562 (Fla. 1984), approving, 449 So 2d 288 (3rd Fla. DCA 1983).

Furthermore, although a police officer is entitled to rely on the contents of a BOLO when "the victim himself/herself made the original report and the source of the information is deemed reliable," Franklin v. State, 374 So 2d 1151, 1153 (Fla. 3rd DCA 1979), the report must contain articulabe facts.

In the instant case, the BOLO issued failed to articulate objective facts to support the officer's stop and investigatory detention of Appellant. Terry v. Ohio, 392 U.S. 1, 21, 88 S.Ct. 1868, 1880, 20 L.Ed.2d. 889, 906 (1968), demands that:

> [In justifying the particular intrusion the police officer must be able to point to specific and articulable facts, which taken together with rational inferences from these facts, reasonably warrant that intrusion.

Appellant submits that the conduct of the police officers amounted to a Fourth Amendment violation and any evidence derived therefrom is "fruit of the poisonous tree" as outlined in Wong Sun v. United States, 371 U.S. 471, 83 S. Ct. 407, 9 L.Ed.2d 441 (1963).

B. The police isolated Appellant from any outside assistance, including a lawyer of his choice and failed to bring appellant before a committing magistrate.

Appellant was arrested and taken into custody and detained at Boca Raton Police Station on May 29th 1984 at approximately 10:30 AM through May 31th 1984, until taken to the Palm Beach Co. Jail at 1:30 AM on the morning of May 31th 1984. During this detainment at the Boca Raton Police Station, Appellant was advised of his rights and in fact signed two separate advisement of rights forms, (See Appendix 1, 2). The first form was signed at 1:10 pm on May 29, 1984 by Appellant using an AKA - DANA L. BROWN. The second form was signed by Appellant using his real name - DUANE E. OWEN. Both forms were witnessed by Officers O'Hara and Brady. In all, Appellant was detained over 36 hours at Boca Raton Police station, and this period was not in any was recorded or perserved in any way except the date of arrest and amount

of hours which were unexplained. Furthermore, Appellant was denied his right to have a lawyer of his choice present at and during this 36 hour period and finally due to the unexplained delay, the appellant was not brought before a committing magistrate.

The Appellant would submit that an advisement of rights and waiver of rights are two different concepts. To eliminate any confusion between the two, United States v. Obregon, 748 F. 2d 1371 (C.A.N.M. 1984) outlined the following:

> To eliminate any confusion between the concepts of "understanding rights" and "waiver of rights", law enforcement officials may find it desirable to utilize two distinct forms, one perhaps captioned "advice of rights" and setting forth suspect's rights under Miranda with a signature line for acknowledgment that he or she has read the statement of rights and understands them, and a second form perhaps captioned "waiver of rights".

At the case at hand, two "advisement of rights" form were signed but that alone will not suffice to make a valid waiver of rights. Even if this Court does not adopt the procedure set forth in Obregon, supra, the Appellant was denied his right to a lawyer of his choice present at and during his 36 hour detainment at Boca Raton Police Station.

In Escobedo v. Illinois, 378 U.S. 478, 84 S.Ct. 1758, 12 L.Ed. 2d. 977 (1964) held at 490-91 that:

> *** where, as here, the investigation is no longer a general inquiry into an unsolved crime but has begun to focus on a particular suspect, the suspect has been taken into police custody, the police carry out a process of interrogations that lends itself to eliciting incriminating statements, "the suspect has requested and been denied an opportunity to consult with a lawyer, and the police have not effectively warned him of his absolute right to remain silent, the accused has been denied" the assistance of counsel in violation of the Sixth Amendment to the Constitution *** and *** no statement elicited by the police during the interrogation may be used against him at a criminal trial (Emphasis added).

Here at the present case, the Appellant asked for a lawyer of his choice, namely Paul Moyle, and Lt. Kevin McCoy generated a hand written account of the 36 hours, and attached as (Appendix 3) is a copy of the request made by Appellant.

As outlined in the Black's Law Dictionary, Fifth Edition,

> LAWYER - A person learned in the law; as an attorney, counsel, or solicitor; a person licensed to practice law. Any person who prosecutes or defends causes in Courts

of records or other judicial tribunals of the United States, or of any of the States, or whose business it is to give legal advice or assistance in relation to any cause or matter whatever.

Appellant will submit to this Court that Paul Moyle was an assistant state attorney at the time of his arrest and detainment. Upon appellants request of Paul Moyle to the police officers, all interrogation should of ceased until this lawyer was provided to appellant for consultation. Miranda v. State of Arizona, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1969). The Court in Miranda, supra at 467-473, held;

> "At the outset, if a person in custody is to be subjected to interrogation, he must first be informed in clear and unequivocal terms that he has the right to remain silent. *** The warning of the right to remain silent must be accompanied by the explaination that anything said can and will be used against the individual in court. * * * Accordingly we hold that an individual held for interrogation must be clearly informed that he has the right to consult with a lawyer and to have the lawyer with him during interrogation. * * *
>
> If an individual indicates that he wishes the assistance of counsel before any interrogation occurs, the authorities cannot rationally ignore or deny his request on the basis that the individual does not have or cannot

afford a retained attorney. * * *

In order to fully apprise a person interrogated of the extent of his rights under this system then, it is necessary to warn him not only that he has the right to consult with an attorney, but also that if he is indigent a lawyer will be appointed to represent him." (Emphasis added).

The Court further stated at 473-74, that:

"Once warnings have been given, the subsequent procedure is clear. If the individual indicates in any manner, at any time prior to or during questioning, that he wishes to remain silent, the interrogation must cease. * * *

If the individual states that he wants an attorney, the interrogation must cease until an attorney is present. At that time, the individual must have an opportunity to confer with the attorney and to have him present during any subsequent questioning. If the individual cannot afford an attorney and he indicates that he wants one before speaking to police, they must respect his decision to remain silent." (Emphasis added).

In Edwards v. Arizona, 451 U.S. 477, 101 S.Ct. 1880, 68 L.Ed.2d 378 (1981), held that: (1) state courts applied an erroneous standard for determining waiver of right to counsel by focusing on voluntariness of confession rather than on wheather

defendant understood his right to counsel and intelligently and knowingly relinquished it, and (2) where defendant had invoked his right to have counsel present during custodial interrogation, valid waiver of that right could not be established by showing only that he responded to police-initiated interrogation after being again advised of his rights; thus, use of defendant's confession against him at his trial violated his rights under Fifth and Fourteenth Amendments to have counsel present during custodial interrogation." Also in, Michigan v. Mosley, 423 U.S. 96, 96 S.Ct. 321, 46 L.Ed.2d 313 (1975), "the Court noted that Miranda had distinguished between the procedual safeguards triggered by a request to remain silent and a request for an attorney and had required that interrogation cease until an attorney was present only if the individual stated that he wanted counsel," at 423 U.S. 104, n. 10. Further in, Rhode Island v. Innis, 446 U.S. 291, 298, 100 S.Ct. 1682, 1688, 64 L.Ed.2d 297 (1980); "where a suspect in custody had invoked his Miranda right to counsel, the Court again referred to the "undisputed right" under Miranda to remain silent and to be free of interrogation."

In the present case, the Appellant clearly asserted his right to a lawyer of his choice at the interrogation and the Courts erroneously applied the standard for determining waiver of right to counsel as in Edwards, supra.

The Arizona Supreme Court applied an erroneous standard for determining waiver where the accused has specifically invoked

his right to counsel. Edwards, Supra. "It is reasonably clear under our cases that waivers of counsel must not only be voluntary but must also constitute a knowingly and intelligent relinquishment or abandonment of a known right or privilege." Johnson v. Zerbst, 304 U.S. 458, 464, 58 S.Ct. 1019, 1023, 82 L.Ed 1461 (1938). See Faretta v. California, 422 U.S. 806, 835, 95 S.Ct. 2525, 2541, 45 L.Ed.2d 562 (1975); North Carolina v. Butler, 441 U.S. 369, 374-75, 99 S.Ct. 1755, 1758, 60 L.Ed.2d 286 (1979); Brewer v. Williams, 430 U.S. 387, 404, 97 S.Ct. 1232, 1242, 51 L.Ed.2d 424 (1977); Fare v. Michael C., 442 U.S. 707, 724-25, 99 S.Ct. 2560, 2571-72, 61 L.Ed 2d. 197 (1979).

Appellant will submit that even if this Court determines that appellant waived his right to have counsel present during that 36 hour detainment, that his right to his Sixth Amendment was violated since the police officers did not comply with his request to have Paul Moyle present during that interrogation. It is well established that Paul Moyle is a lawyer as he is a member of the Florida Bar Association and his duties as outlined in the Code of Professsional Responsibility under Canon 7, DR 7-103 is:

A) A public prosecutor or other government lawyer shall not institute or cause to be instituted criminal charges when he knows or it is obvious that the charges are not supported by probable cause.

B) A public prosecutor or other government lawyer in

criminal litigation shall make timely disclosure to counsel for a defendant, or <u>to the defendant if he has no counsel</u>, of the existence of evidence, known to the prosecutor or other government lawyer, that tends to negate the guilt of the accused, mitigate the degree of the offence, or reduce the punishment.

Had the Appellant in the present case waived his right to counsel at that interrogation, he was still entitled to confer with Paul Moyle as to any evidence, punishment or to negotiate a deal (if any).

As in <u>Edwards</u>, <u>supra</u>, "Edwards denied involvement and gave a taped statement presenting an alibi defense. He then sought to "make a deal". The interrogating officer told him that he wanted a statement, but that he did not have the authority to negotiate a deal. The officer provided Edwards with a telephone number of a county attorney." Edwards hung up before placing the call.

In the Black's law dictionary, fifth Edition;

<u>County attorney</u>- Attorney employed by county to represent it in civil matters; also, the prosecuting attorney in many counties.

In the present case, appellant was not given the opportunity to call or have present an attorney at the interrogation. Therefore, without a complete record, it can never be established what appellant's intentions were after conferring with a lawyer of his choice.

The police isolated appellant from any ouside assistance and further compounded the situation by not bringing appellant before a committing magistrate as per Rule 3.130 (a) of Florida Rules of Criminal Procedures. As this Court can clearly see, Appellant was detained by Boca Raton Police for over 36 hours until he was taken to the county jail on May 31th at 1:30 AM.

In United States v. Yong Bing-Gong, 594 F. Supp. 248, affirmed; U.S. v. Bing-Nam, 788 F.2d 4 (D.C.N.Y. 1984); "Approximately 20-hour delay between defendant's arrest and arraignment was so manifestly unreasonable as to warrant suppression of all statements made by defendant prior to his arraignment where officers had no legitimate excuse for not arraigning defendant promptly." Also see: United States v. Khan, 625 F. Supp. 868 (S.D.N.Y. 1986).

Even if Appellant did not make any statements during this 36 hours, his right to counsel was violated since the delay enabled him from being appointed counsel.

C. The police continued to interrogate and question Appellant even after his appointment of counsel at arraignment.

Appellant was arraigned either on May 31, 1984 or June 1st, 1984, however the record is unclear as to the exact date of arraignment. During the motion to suppress, testimony was

elicited from the State's chief witness, Kevin McCoy, that he knew Appellant had been to arraignment and appointed counsel. Other officers including Delray Beach Police Department knew of this fact but continued to interrogate appellant on June 1st 1984 through June 21st 1984, (see transcription of the videotapes). Furthermore the Appellant asserted his right to a lawyer of his choice throughout the interrogations and that request for Paul Moyle is reflected on the transcription of the videotapes also.

The rights guaranteed a defendant by the Sixth and Fourteenth Amendments, is indispensable to the fair administration of our adversary system of criminal justice. Its vital need at the pretrial stage has perhaps nowhere been more succinctly explained than in Justice Sutherland's memorable words in <u>Powell v. Alabama</u>, 287 U.S. 45, 57, 53 S.Ct. 55, 59, 77 L.Ed 158:

> "During perhaps the most critical period of the proceeding against these defendants, that is to say, from the time of their arraignment until the beginning of their trial, when consultation, through-going investigation and preparation were vitally important, the defendants did not have the aid of counsel in any real sense, although they were as much entitled to such aid during that period as at the trial itself."

Thus, once the state has committed itself to prosecute, the defendant invokes his or her Sixth Amendment right to be represented by counsel at a procedure, such as an arraignment,

that constitutes a "critical stage of the prosecution", United States v. Wade, 388 U.S. 218, 237, 87 S.Ct. 1926, 1937, 18 L.Ed 2d 1149 (1967), Massiah v. United States, 377 U.S. 201, 84 S.Ct. 1199, 12 L.Ed.2d 246 (1964).

In Michigan v. Jackson, — U.S. —, 106 S.Ct. 1404, 89 L.Ed.2d 631 (1986), the Supreme Court set out the approach to be employed in assessing the scope of an individual's invocation of his or her constitutional right to counsel. The defendants in Jackson were arrested for murder. At their arraignments, they asked the court to appoint counsel. Id. at 106 S.Ct. 1406. The state subsequently interrogated the defendants without their attorneys. The defendants who were later convicted, appealed, claiming the state had violated their Sixth Amendment rights by failing to honor their request for counsel. The court held at 106 S.Ct. 1407 that, "Individuals have both a Sixth Amendment and a Fifth Amendment right to counsel at "post-arraignment" custodial interrogations".

In the present case, the Appellant was arraigned on several burglaries and FTA (failure to appear) cases, however the state used those cases to identify the Appellant in the present case. Since the state and it's officers were aware of Appellant's arraignment, appellant's Sixth and Fifth Amendment rights were violated.

In United States ex rel. Espinoza v. Fairman, 813 F.2d 117 (7th Cir. 1987), the Court held that:

"Defendant invoked his Fifth Amendment right to counsel

during interrogation for murder charge at his earlier arraignment on weapons charge at which time he requested counsel, even though he did not specifically articulate why or for what purpose he sought counsel; declining to follow, Collins v. Francis, 728 F.2d 1322 (11th Cir.); Jordan v. Watkins, 681 F.2d 1067 (5th Cir.); Blasingame v. Estelle, 604 F.2d 893 (5th Cir.)."

Because an individual who does not understand his or her rights cannot validly waive them, see Moran v. Burbine, 106 S. Ct. at 1141, cited therein, U.S. ex rel. Espinoza, supra, we are required to presume that an individual who requests counsel at his or her arraignment is asserting both a Sixth and a Fifth Amendment right even if the individual does not "articulate exactly why or for what purposes he is seeking counsel," Jackson, 106 S. Ct. at 1409 n.7 (quoting Michigan v. Jackson, 421 Mich. at 63-64, 365 N.W.2d at 67).

In the present case, as in Jackson, U.S. ex rel. Espinoza, supra, the Appellant's unqualified acceptance of counsel at his arraignment was an invocation of his fifth Amendment right, and his persistances of his right to a choice of a lawyer, violated both his fifth and sixth Amendment right to counsel during all interrogations.

D. Appellant's Fourth Amendment Rights were violated by the Illegal Electronical means of search and seizure.

Appellant was interrogated from June 3rd though June 21st, in which his statements were videotaped in violation of his rights under the Fourth Amendment of the United States and Article 1, Sec. 12 of Florida Constitution.

Article 1, sec. 12, reads:

> "The right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures, and against the unreasonable interception of private communications by any means, shall not be violated. No warrant shall issued except upon probable cause, supported by affidavit, particularly describing the place or places to be searched, the person or persons, thing or things to be seized, the communication to be intercepted, and the nature of evidence to be obtained. This right shall be construed in conformity with the 4th Amendment to the U.S. Constitution, as interpreted by the U.S. Supreme Court. Articles or information obtained in violation of this right shall not be admissible under evidence if such articles or information would be inadmissible under decisions of the U.S. Supreme Court construing the 4th Amendment to the U.S. Constitution."

In the instant case, Appellant was arrested on May 29th, 1984 and he was interrogated from that date up until June 1st, 1984 without being recorded in anyway. The State through its officers decided to record Appellants conversations on June 3rd through June 21st, however prior to June 3rd, the State and its officers had sufficent amount of time to obtain a warrant from a Judge of competent Jurisdiction.

The Appellant relies on Florida Statutes, § 934.09, and would submit that the State and its officers violated Appellant's rights under the Fourth Amendment of the United States Constitution and Article 1, sec. 12, of Florida Constitution.

The State or its officers did not obtain a warrant to intercept Appellant's conversations, and after the officers videotaped Appellant, section 934.09 was further violated since the video-tapes were not sealed in a way as to protect the recordings from editing or other altercations.

In United States v. Rodriguez, 786 F.2d 472, 477-78 (2d. Cir 1986), "defendant's motion to suppress must be granted unless the government has adequate explanation for delay in sealing". United States v. Gigante, 538 F.2d 502, 507 (2d. Cir 1976), "even without showing evidence of tampering, government's unexplained delay in complying with statutory sealing requirements required exclusion of evidence from trial".

In the case at hand, the State and its officers not only violated Appellant's Fourth Amendment rights, but didn't

obtain a warrant to intercept Appellant's conversations and even if they obtained a warrant, (which was not done), the videotapes were not sealed in anyway as to show the tapes were not tampered with. Furthermore the tapes did not have a counter-clock to reflect the date, time of the conversations all of which require suppression of the videotapes and conversations obtained therein.

E. The police continued to interrogate Appellant after he invoked his right to remain silent.

In Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602, 16 L. Ed.2d 694 (1966), the Supreme Court establised procedural safeguards to protect the constitutional rights of persons subject to custodial interrogation.

Among the procedural safeguards established by the Miranda Court is the "right to cut off questioning". Miranda, 384 U.S. at 474, 86 S.Ct. at 1628. This right, established as a "critical safeguard" of the Fifth Amendment right to remain silent, Mosley at, 423 U.S. at 103, 96 S.Ct. at 326, requires the police to immediately cease interrogation once the suspect "indicates in any manner, at any time .... during questioning, that he wishes to remain silent." Miranda, supra, 384 U.S. at 473-74, 86 S.Ct. at 1627-28 (emphasis added); Mosley, 423 U.S. at 100, 96 S.Ct. at 325; see Martin v. Wainwright, 770 F.2d 918, 923-24 (11th Cir, 1985)

modified, 781 F.2d 185, cert. denied, — U.S. —, 107 S. Ct. 307, 93 L. Ed.2d 281 (1986).

The determination of whether a suspect's right to cut off questioning was scrupulously honored requires a case-by-case analysis. United States v. Hernandez, 574 F.2d 1362, 1369, (5th Cir. 1978).

In the instant case, the Appellant twice indicated that he no longer wished to discuss the case any further with the police, however they confronted him with incriminating evidence.

> Appellant: I rather not talk about it. (R.3000).
>
> Voice D: I'll show you again. (R. 3002).
>
> Appellant: I don't want to talk about it. (R.3018).
>
> Voice C: It's all over, you might as well. You can't get around all this stuff, you got no out. (R.3018).

Additionally, the police confronted appellant with incriminating evidence to overcome appellant's right to remain silent.

> Appellant: I rather not talk about it. (R.3000).
>
> Voice D: Things happen, Duane. We can't change them once they're done. But you can sure make it easier on two parents that need to know. (R.3000-3001).
>
> Voice C: And a whole town full of babysitters that are afraid to go outside. That's how the kids make all their money in the summer. (R.3001).

Appellant: I don't want to talk about it. (R.3018).

Voice D: Don't you think its necessary to talk about it, Duane?. Two months have gone by already, Duane. That's a long time; its a long time for people to wonder; its a long time for you to hold it within yourself; its a long time for people to wonder. (R. 3018).

Voice C: And be scared. (R.3018)

Voice D: Don't you think its time to put all that to rest? I think you do. (R.3018)

Voice C: Its all over, you might as well. You can't get around all this stuff. You got no out. (R.3018).

Voice D: This isn't going to disappear. (R.3018).

In a similar case decided by the United States Court of Appeals, Eleventh Circuit, 1 FLW Fed. C1099, September 4, 1987; in Christopher v. State of Florida, the almost exact circumstances were at hand. In Christopher, supra, the following transcript of the confession was:

Christopher: Then I got nothing else to say. If your accusing me of murder, then take me down there.

Mills: You were accused when you came in here. You knew you were accused.

Christopher: Thats right. That's right.

Mills: - you knew what you were accused of, and I told you what (your daughter) was accused of, so don't make out like you don't know what you're accused of.

Christopher: Oh, ah, - I know what I'm accused of. I know that I'm accused of two murders.

Mills: I told you awhile ago you were being charged with both murders.

Christopher: Okay then, I got nothing else to say.

Here the Court concluded that, "The interrogation did not cease immediately after Christopher first indication that he wished to remain silent, and, in fact, continued despite Christopher's repeated invocations of his right of silence. Accordingly, there can be no doubt that the officers violated Christopher's right to cut of questioning; therefore; all statements taken during the unlawfully continued interrogation were inadmissible." See Martin, supra, 770 F.2d at 923; United States v. Poole, 794 F.2d 462, 466-467 (9th Cir. 1986); Anderson v. Smith, 751 F.2d 96, 105 (2d Cir 1984); cf. Mosley, 423 U.S. 105-06, 96 S.Ct. at 327; Bosby, 675 F.2d at 1182.

In the present case, Appellant's rights were not scrupulously honored as required by, U.S. v. Hernandez, supra. It is shown that Appellant's desired to remain silent and cease interrogation is similar to that in the situation of Christopher supra, and should be given the same results.

As a consequence of precedent and the Appellant's desire to no longer discuss the matter at issue with the police, and statements made thereafter to law enforcement officers should have been suppressed as violative of Appellant's Constitutional right to remain silent. Since these statements were introduced into evidence over Appellant's objections and in violation of the Fifth Amendment to the United States Constitution, Appellant's conviction must be reversed, and the videotapes suppressed, and this cause remanded for a new trial.

II. The Appellant was Deprived of Due Process of Law and a Fair Trial by the State's Destruction of Evidence in Violation of the Fifth and Fourteenth Amendments, Florida Law, and Notions of Basic Fairness.

A. Appellant was denied a meaningful opportunity to present a complete defense.

Due Process of law contemplates the presentation of full evidence in a criminal trial. Henderson v. State, 20 So. 2d. 649, 651 (1945). The State has an affirmative duty to safeguard and preserve evidence. This duty is derived from the State's duty to disclose exculpatory evidence. See, e.g., Brady v. Maryland, 373 U.S. 83 (1963), Fla. R. Crim. Proc. R. 3.220. This Court has held that when the State loses or destroys evidence, the conviction must be reversed if the error "injuriously affected the substantial rights of the defendants." Salvatore v. State, 366 So 2d 745, 751 (Fla. 1979).

The Appellant in the instant case was arrested and taken into custody on May 29th, 1984 at approximately 10:30 AM. During that arrest date up until the Appellant was taken

to the county jail on May 31th, 1984 at 1:30 AM, the Appellant was detained at Boca Raton Police Station for about 36 hours all of which the Appellant was deprived of his right to have a lawyer of his choice present, isolated from any outside assistance, and not taken before a committing magistrate within the prescribed Rules. Furthermore, the arresting officers did not in anyway try and preserve the investagation-interrogation of Appellant over that 36 hour period.

After Appellant was appointed counsel at first appearance with the knowledge of that fact by the arresting officers, the Appellant was again interrogated on June 1st, 1984. Again on that day the Appellant was deprived of his choice of a lawyer to be present and was interrogated about 7 hours that day. Neither officer brought a tape recorder, nor made any attempt to record that interview, although the room in which the officers utilized was set up for video taping, and in fact the Appellant was videotaped in that same room, in excess of over 20 hours, as follows;

June 3, 1984 - 5:00 pm then 11:30 pm
June 6, 1984 - 11:15 AM then 4:20 pm
June 7, 1984 - 6:00 pm then 10:55 pm
June 8, 1984 - 1:45 pm then 4:00 pm
June 18, 1984 - 4:30 pm then 9:10 pm
June 21, 1984 - Approximately 5 hours.

Note: None of the videotapes have a counter-clock which reflects the Date, time.

.... it cannot be determined that Appellant was given the benefit of having an adequate record of the conversations that took place during all of the interrogations since the Appellant was selectively recorded. Whether there was pressure, intimidation, or veiled threats made during the initial conversations or the portions that were selectively recorded of Appellant will never be known. Also it is established by the hand written notes made by Lt. McCoy that Appellant did in fact ask to see a lawyer, namely Paul Moyle, it will never be known for sure whether Appellant ask before each videotaped session for a lawyer, due to the police officers selectively recording Appellant.

The Appellant submits that the State's intentional, deliberate and bad faith destruction of the above evidence violated his rights to due process as guaranteed by the United States Constitution, the Florida Constitution and the Brady doctrine.

In State v. Wright, 87 Wn. 2d 783, 557 P.2d 1 (1976), cited therein; United States v. Bryant, 142 U.S. App. D.C. 132, 439 F.2d 642, 644 (1971), "whereas the Court found the crucial nature of missing evidence, (a tape recording of a conversation with the defendant) and the "unavoidable possibility" that the evidence might have been significantly favorable to the accused, brought the case within the protection of the

due process clause." Bryant held, at 651, that "before a request for discovery has been made, the duty of disclosure is operative as a duty of preservation." Also see; People v. Hitch, 12 Cal. 3d 641, 117 Cal. Rptr. 9, 527 P.2d 361 (1974) which involved the destruction of a recurring form of evidence, parts of an instrument used to determine intoxication. The Court held those parts of the breathalyzer which may be profitably retested prior to trial were material evidence on the issue of guilt or innocence of the charge of driving under the influence of alcohol, that due process requires such evidence be disclosed by the prosecution, and "thus that the investigative agency has the duty to preserve the evidence for disclosure." Id. Accord, Government of the Virgin Islands v. Testamark, 570 F.2d 1162, 1168 (3rd Cir. 1978); People v. Moore, 34 Cal. 3d 215, 666 P.2d 419, 193 Cal. Rptr. 404 (1983); (failure to preserve urine samples); People v. Harmes, 560 P.2d 470 (Cal. Ct. App. 1976)(erasures of videotape of alleged police station assult); Seattle v. Fettig, 519 P.2d 1002 (Wash. App. 1974)(loss of videotape of defendant's performance of standard coordination and balancing test at time of arrest); Stipp v. State, 371 So 2d 712 (Fla. Dist. Ct. App. 1979) (inadvertent destruction of cocaine allegedly seized from defendant); Jarriel v. State, 317 So 2d 141 (Fla. Dist. Ct. App. 1975) (unintentional destruction of tape recording of the transaction out of which defendants were charged with lacency).

In the instant case, the State through its agents intentionally failed to record or erased what should have been recorded, crucial portions of the conversations between law enforcement officers and the Appellant. The States' failure to record these conversations, or erased them, allows them to introduce into evidence essentially irrefutable evidence that the Appellant waived his right to remain silent or ask for a lawyer of his choice all of which deprived him of Due Process.

The Supreme Court has articulated three criteria for measuring when the Brady disclosure rule has been violated:

(A) suppression of evidence by the prosecution after a request by the defense;

(B) the evidences' favorable character for the defense, and

(C) the materiality of the evidence.

Moore v. Illinois, 407 U.S. 786, 794 (1972); United States v. Barshov, 733 F.2d 842, 848 (11th Cir. 1984); Salvatore v. State, 366 So 2d 745, 750-751 (Fla. 1979).

Starting with the first criteria in the case at bar, the evidence was "suppresssed" by having been intentionally not recorded prior not only to trial but even prior to the appellant's indictment. Compare Budman v. State, 362 So. 2d 1022, 1025 (Fla. 3rd DCA 1978) citing Bryant, supra.

The Budman court noted that, consistent with the

purpose of safeguard of due process, another duty exist, the so-called "duty of preservation":

> (A) duty of preservation attaches in some form once the State has first gathered and taken possession of any discoverable matter. Otherwise, disclosure might be avoided by destroying vital matter before a defendant learns of its existence. We feel strongly that the duty of disclosure is operative only as a duty of preservation; only then, may meaningful discovery be possible later on, at 1026.

The safeguard of a fair trial is an extremely important one, but it may be undercut at the pre-trial period by bureaucratic procedures or discoverable material. Budman, supra, at 1024. Such a violation of the Stated duty of preservation occurred here, via the selectively recordings of appellant's videotapes.

Section 918.13 of the Florida Statutes on Criminal Procedures is a codification of the "duty of preservation". The statute entitled Tampering with or Fabricating "Physical Evidence" states:

> (1) No person, knowing that a criminal trial or proceeding or an investigation by a duly constituted prosecuting authority, law enforcement agency, ... is pending ...... shall:

(A) Alter, destroy, conceal or remove any record, document or thing with the purpose to impair its verity or availability in such proceedings or investigation ......

Since the State intentionally neglacted to record portions of Appellant's conversations and since the State intentionally erased not only portions of conversations but erased the Date, time, and clock on the videotapes clearly violates the mandate of Section 918.13.

Part (A) of the Moore v. Illinois criteria, supra, as discussed above, requires a look at the facts surrounding the suppression or destruction of evidence. Florida courts have adopted a variation on parts (B) and (C) of the Moore v. Illinois test, those parts dealing with whether the evidence was favorable to the defendant and whether it was material. Florida uses a "variable standard" to weigh wheather to vitiate a conviction and obtain a new trial where vital evidence has been destroyed. Salvatore v. State, 366 So 2d 745, 751 (Fla. 1978). It is the duty of the reviewing court to consider the trial record as a whole and inquire whether any claimed error is harmless beyond a reasonable doubt. United States v. Hastings, ___ U.S. ___, 103 S.Ct. 1974, 1981 (1983). The Florida variation on this "harmless error" standard assesses that harm caused by lost or destroyed material by balancing the reasons underlying the State's failure to furnish the discovery against the importance

of the missing evidence to the defendant. State v. Sobel, 363 So.2d. 324, 326 (Fla. 1978). See generally, State v. DelGuadio 445 So2d 605, 610-11, n.7 (Fla. 3rd DCA 1984), and cases cited therein (where discovery cannot be made, balance the extent of the prejudice to the defendant against the reason why the evidence is gone). In Florida, the "standard of prejudice which must be met by the defendant in order to obtain a new trial varies inversely with the degree to which the conduct of the trial violated fundamental notions of fairness." Salvatore v. State, supra at 751.

"Under such a variable standard, more deliberate or flagrant conduct by the prosecution in suppressing evidence requires less of a showing of prejudice to the defendant, while more excusable conduct on the part of the prosecutor -- such as mere negligence -- calls for a greater showing of prejudice to the defendant before relief will be granted." Id. In Salvatore, the Court found "mere negligence" and harmless error in the unintentional loss of a tape recording of a co-participant's statement to a detective in a first degree murder trial, because defense counsel had access to the tapes before they were destroyed. Id. Contrast the finding of reversible error in Farrell v. State, 317 So 2d 142 (Fla. 1st DCA 1975), where the parties had stipulated that unintentionally erased tape recordings of a drug transaction would have benefited the defendant, so

that the tapes destroyed resulted in prejudice.

In the case at bar, the destroyed evidence unquestionably contained conversations material and relevant to the issue of guilt or innocence. Without this evidence it will never be determined what was said during this interrogation, and since the State failed to have the videotapes sealed as required, it is questionable whether the tapes were again altered before reaching defense counsel during discovery.

The Appellant maintains that the missing evidence would have benefited him and was crucial to his defense. "Whenever potentially exculpatory evidence is permanently lost, courts face the treacherous task of divining the import of the material whose content is unknown and very often disputed." Trombetta, at 2533. California v. Trombetta, ___ U.S. ___, 104 S.Ct. 2528 (1984), stating:

> Under the Due Process Clause of the Fourteenth Amendment, criminal prosecutions must comport with prevailing notions of fundamental fairness. We have long interpreted this standard of fairness to require that criminal defendants be afforded a meaningful opportunity to present a complete defense. To safeguard that right, the court has developed "what might loosely be called the area of constitutionally guaranteed access to evidence." (citation omitted).

Taken together, this group of constitutional privileges delivers exculpatory evidence into the hands of the accused, thereby protecting the innocent from erroneous conviction and ensuring the integrity of our criminal justice system. Id, 104 S.Ct. at 2532.

Florida courts have followed federal constitutional mandates regarding State violations of an Appellant's fundamental right of due process and are "equally concerned" with "breaches of the Florida Rules of Criminal Procedure and basic fairness". Stipp v. State, 371 So 2d 712, 714 (Fla. 4th DCA 1979). Florida case law requiring the area of "constitutionally guaranteed access to evidence," Trombetta, supra, at 2532, is based on the holding of Brady v. Maryland, supra. See James v. State, 453 So 2d 786, 789 (Fla. 1984); State v. Sobel, supra.

The problems inherent in considering destroyed evidence were analyzed in United States v. Bryant, supra, cited in Budman, supra at 1025, in the Court's discussion of the prejudicial effect of a destroyed taped recording:

> For all we know, the tape would have corroborated (the witness) story perfectly; or, for all we know, it might have completely undercut the government's case. There is not simply "substantial room for doubt", but room for nothing except doubt as to the effect of disclosure. What we know is that

> the conversations recorded on the tape were absolutely crucial to the question of appellant's guilt or innocence. That fact, coupled with the unavoidable possibility that the tape might have been significantly "favorable" to the accused, is enough to bring these cases within the constitutional concern.

The evidence destroyed by the State in this case was also "absolutely cricial" to the question of the Appellant's guilt or innocence. As in Bryant, the evidence destroyed could have either corroborated the testimony of the prosecution's key witness, Lt. Kevin McCoy, or completely exonerated the Appellant from Blame, and cannot be lightly disregarded in assessssing reversible error.

The Appellant clearly suffered substantial prejudice, because in the circumstances of this case, and the weakness of the State's case, the State cannot carry its burden that the lost or missing evidence would not have been beneficial to the accused.

> It is wrong for the State to unnessarily destroy the most critical inculpatory evidence in its case against the accused and then be allowed to introduce essentially irrefutable testimony of the most damaging nature against the accused. It is wrong because it violates the most fundamental right of due

process constitutionally mandated in Florida and in the United States. Stipp v. State, 371 So 2d 712, 713 (Fla. 4th DCA 1979), State v. Ritter, 448 So 2d 512, 514 (Fla. 5th DCA 1984), State v. Hill, 467 So 2d 845, 848, 849 (Fla. 4th DCA 1985).

The same unfairness pervades when the missing evidence requires scientific analysis. Lancaster v. State, 457 So 2d 506, 507 (Fla. 4th DCA 1984).

Because the State unnecessarily and intentionally destroyed relevant, material and at the least potentially exculpatory evidence in its case against Appellant, clear error has occured in violation of the Appellant's constitutional rights, state law guarantees and guarantees of fundamental fairness.

Therefore his conviction must be reversed with directions to disregard the use of the videotapes.

III. The Appellant, Duane Eugene Owen, was denied his Sixth Amendment right to the assistance of Counsel for his Defense through the negligent and therefore Ineffective Assistance of Trial Counsel.

A. The appellant was deprived of a fair trial due to the deficient performance by trial counsel.

1. Jurisdiction

Historically, a post conviction claim by a defendant-Appellant that he was not benefited with effective assistance of trial counsel could not be raised for the first time on direct appeal. State v. Barber, 301 So. 2d 7 (Fla. 1974); Kampff v. State, 443 So. 2d 401 (Fla. 4th DCA 1984); United States v. Lopez, 728 F. 2d 1359 (11th Cir. 1984). Post-conviction relief under Rule 3.850 of Fla. Rules of Crim. Procedures has been the remedial vehicle pursued when ineffectiveness of counsel is raised and supported by the record of the proceedings. Recently however, this Court held that claims regarding whether a Defendant received ineffective assistance of counsel could be raised, for the

first time, on direct appeal. Adams v. State, 456 So. 2d 888, 890 (Fla. 1984). In Adams, the defendant-appellant had filed a motion to vacate his conviction and sentence of first-degree murder and sentence of death before the trial court. The Circuit Court, Marion County, denied the motion and the defendant appealed. The defendant also filed a motion for stay of execution and a writ of Habeas Corpus. This Honorable Court, Adkins, J., held that "these are all matters which could have been raised under direct appeal and which as the trial judge correctly held, were not properly entertained in a 3.850 motion." Although this Court upheld the denial of said motion and thus affirmed the trial court's decision, the jurisdictional issue and precedent set by Adams is ostensibly viable and therefore applicable to the case sub judice.

Furthermore, in Combs v. State, 403 So. 2d 422 (Fla. 1981) which stated, "If appellant counsel in a criminal proceeding honestly believes there is an issue of reasonly effective assistance of counsel in either the trial or the sentencing phase before the trial court, that issue should be immediately presented to the appellant court so that it may be resolved in an expeditious manner by remand to the trial court and avoid unnecessary and duplicitous proceeding."

2. Facts

The pre-trial motion to suppress defendant - appellant statement's was held on July 29th 1985 through August 2nd 1985 and denied on August 2nd 1985 before Honorable Richard B. Burk. During this proceeding, counsel of record, Berry Krischer argued strongly that the statement's of the appellant was taken in violation of the constitution of the United States and Florida, and furthermore that the various police officers used "trickery", "promises", "totally lack of probable cause to arrest and detain appellant", and "continued to interrogate appellant after he excercised his right to remain silent", (R.3000 - R.3018). Also Berry Krischer, "argued that the police selectively recorded portions of the statements which denied appellant access to Brady and other exculpatory material".

Before this hearing however, Berry Krischer hired a private investigator, Robert Krantz to view and recommend to him certain areas of the videotapes that should be brought up during the motion to suppresss. Robert Krantz completed his report and recommendation on March 24, 1985 and his second report on April 8, 1985. Through his report he indicated several suggestions including having the videotapes examined by a local technician to see if there are any erasures, edits, or cuts which is a very valuable suggestion since Barry Krischer argued that there was a Brady violation,

as argued during the motion to suppress.

Robert Krantz's report is attached as (Appendix 4). Even though Robert Krantz recommended that the videotapes be examined, Berry Krischer ignored this and supported the Brady violated with his own opinion and mere speculations which amounted to a breakdown in his function as counsel guaranteed the defendant by the Sixth Amendment.

> "Of all the rights that an accused person has, the right to be represented by counsel is by far the most precious, for it affects its ability to assert any other right he might have."

United States v Cronic, __ U.S. __, 104 S.Ct. 2039, 2044 (1984), citing, Schafer, Federalism and State Criminal Procedures, 70 Harv. L. Rev 1, 8 (1956). This special value of the right to assistance of counsel explains why "It has long been recognized that the right to counsel is the right to the effective assistance of counsel." (emphasis added). Cronic, supra, citing, McMann v Richardson, 397 U.S. 759, 771, n. 14, 90 S.Ct. 1441 1449, 25 L. Ed. 2d 763 (1970). However, the right to the effective assistance of counsel is recognized not for its own sake, but because of the effect it has on the ability of the accused to receive a fair trial. 104 S.Ct. at 2046. Generally, only where the challenged conduct has had some effect on the reliability of the trial process will the Sixth Amendment

guarantee be implicated. See, United States v. Valenzuela-Bernal, 458 U.S. 858, 867-869, 102 S.Ct. 3440, 3446-3447, 73 L.Ed.2d 1193 (1982).

The conduct of trial counsel in the case at bar had a definite effect on the reliability of the trial process. In this crucial instance, at the significant pre-trial phase, defense counsel's conduct was grossly negligent and was of such a nature that it had a significant effect on the integrity of the actual truth-finding process.

The Supreme Court of the United States in an opinion by Justice O'Connor has set forth guidelines(1) relating specifically to the challenge of a death sentence on the grounds of ineffective assistance of counsel. Strickland v. Washington, — US —, 104 S.Ct. 2064 (1984). Fundamentally, Washington sets forth two components which must necessarily be shown in order to require reversal of a death sentence: "First, the defendant must show that counsel's performance was deficient." "Second, the defendant must show that the deficient performance prejudiced the defense." Id., see, also, Knight v. State, 394 So 2d 997 (Fla. 1981). The Court also stated that "The benchmark for judging any claim of ineffectiveness must be the reasons why Counsel's conduct so undermined the proper functioning of the adversarial process that the trial

(1) The Court was explicit in noting that its decision did not purport to set absolute standards but only guidelines. 104 S.Ct. at 0269.

cannot be relied on as having produced a just result. 104 S.Ct. at 0269.

It cannot be gainsaid that trial counsel's failure to follow up on the investigator leads and have the videotapes examined was anything but deficient. Moreover, the record on appeal reflects that trial counsel felt confident in his opinion and mere speculations to present argument on the pre-trial motion. This conduct, by any reasonable and objective standard, would be considered to be deficient and negligent and, at most, deliberate and outrageous. When one considers the proper preservation of error at the trial level and the duty of trial counsel to "protect the record", the inactions of defense counsel in crucial situations, (having videotapes examined) clearly results in prejudice to appellant. Moreover, as presented in the section under "Brady violation," counsel's failure to properly present legal argument denied appellant of important pre-trial vehicles. It is apparent and clear that trial counsel's conduct from the outset, "so undermined the adversarial process that the trial could not be relied on as having produced a just result." 104 S.Ct. at 2064.

This Court has recently adopted the decision in Washington. See, Clark v. State, slip opinion 64,012 at 1108 (Fla.1984). In Clark, this Court noted that "there has been recent proliferation of ineffectiveness of counsel challenges.," Id.,

and rightfully held that "a claim of ineffective assistance of counsel is extraordinary and should be made only when the facts warrant it." Id.

In judging attorney performance, the proper standard is that of "reasonably effective assistance, considering all the circumstances." 104 S.Ct. at 2064. Further, the appellant must "show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." (emphasis added) 104 S.Ct. at 2068. However, the appellant "need not show that counsel's deficient conduct more likely than not altered the outcome in this case." (emphasis added) Id. Most significantly, this Court "need not decide whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies." 104 S.Ct. at 2069-70. The prejudice suffered by appellant in the case instanter is not merely clear and apparent, but stark and glaring even if regarded by peripheral scrutiny.

B. Actions by the trial court precluding testimony of officer Pelligrini regarding another suspect deprived Appellant of effective assistant of counsel.

The law in Florida is clear that "one accused of a

crime may show his innocence by proof of the guilt of another." Pahl v. State, 415 So 2d 42 (Fla. 2DCA 1982); cited therein, Lindsay v. State, 69 Fla. 641, 68 So. 932 (1915); see also, Moreno v State, 418 So 2d 1223 (Fla. 3DCA 1982); cited therein, Holt v. United States, 342 F.2d. 163 (5 Cir. 1965); Chandler v. State, 366 So 2d 64 (Fla. 3DCA 1979); Watts v. State, 354 So 2d 145 (Fla. 2DCA 1978); and Commonwealth v. Keizer, 385 N.E. 2d 1001 (Mass. 1979). The Third District held in Moreno, supra, that:

> "Where evidence tends, in any way, even indirectly, to prove a defendant's innocence, it is error to deny its admission. At 1225."

In the instant case at bar, Appellant maintains that he was denied a meaningful sixth amendment right to effective assistance of counsel when prohibited by the trial court from cross-examining Officer Pelligrini, as to evidence which would lead to another suspect. During the cross-examination of Officer Pelligrini, counsel of record attempted to elicit information concerning similarities between the Appellant's case and another investigation. (R. 2471). After the State objected, the jury was excused from the courtroom. (R. 2475). Counsel of Record proffered the testimony of Officer Pelligrini to the Court. (R. 2485-89). The trial court then sustained the State's objection to the particular line of questioning. (R. 2495).

The excluded testimony would have, in essence, shown that this officer made observations at another crime scene which were similar to the instant crime scene. Specifically, a burglary which occured in another area of the city, where a bicycle was found with handlebars attached in a unique fashion and pink bubble gum on the bicycle. In the case at bar, there exist evidence of Appellant's bicycle matching the above description, and there was gum found in the shorts of the victim. (R. 2488). Additionally, therewas what appeared to be blood on the handlebars of this second bicyle, (R. 2489), which was not connected to the Appellant, but rather, would lead to anothers' involvement in the crime.

Basically, the theory of defense which was excluded was that evidence found at the second crime scene was so similar in nature so as to connect another person to the instant crimes rather than Appellant. Trial counsel advised the Court that no effective cross-examination of the witness could be conducted and that Appellant's theory of defense had been stripped. Specifically, counsel stated:

> ... it precludes Mr. Owen of effective cross-examination based upon the specific ruling. I am put in a position where I have no cross-examination.
>
> * * * * *
>
> By the court's ruling, the court has stripped the defense of the theory.

I think the record needs to be clear as to why I am not cross-examining; if an appellate court reads this many months from now that I dont want to cross-examine. By virtue of your ruling, he has been denied a portion of our competence, in that our -- his theory of defense in now being deprived; as a result of that, we have no cross-examination. (R. 2498-99).

In furthering his position, trial counsel moved for a mistrial because Appellant was in essence being deprived of his defense. (R. 2500). The trial court grossly overlooked the points being raised by Appellant, which is evident from the ruling.

[The Court: If I have to grant a motion for mistrial in every case where the Defendant has no defense of that which he is accused, there wouldn't be cases that could ever be tried. (R. 2501).

While the trial court's statement is accurate, it was non-responsive to the facts and issues at bar. It was not being argued that Appellant had no defense, but rather that he did have a defense which the trial court had just excluded.

An anology can be made to the situation where a trial court prohibits a defendant from asserting an insanity defense. This Court held in Morgan v. State, 453 So 2d 394 (Fla. 1984),

that,

> It is clear that Appellant was denied a reasonable opportunity to present witnesses at his trial. The jury may not have accepted the testimony of these witnesses, but a defendant must be afforded an opportunity to present available defenses and witnesses in support of those defenses. at 397.

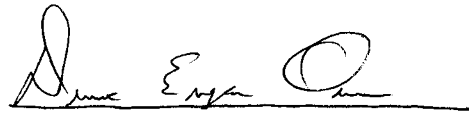
Morgan's conviction and sentence were vacated with a remand for a new trial because this Court found that, just as in the instant appeal, the defendant was denied his Sixth Amendment right to confrontation of witnesses, and to present a valid defense.

In the instant appeal, since the Appellant was denied his rights as guaranteed him by the Sixth Amendment to the United States Constitution, and since a valid defense was improperly excluded by the trial Court, the conviction and sentence must be vacated, and the cause remanded for a new trial.

Conclusion

For the reasons set forth above, the Appellant, Duane Eugene Owen, respectfully prays this Honorable Court to reverse the judgment and sentence entered by the Circuit Court of the Fifteenth Judicial Circuit, Palm Beach, Florida.

Respectfully submitted,



Duane Eugene Owen #101660
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Certificate of Service

I, Hereby Certify that a true and correct copy of the foregoing has been furnished by U.S. Postal Service this 16th day of Nov., 19 87; to:

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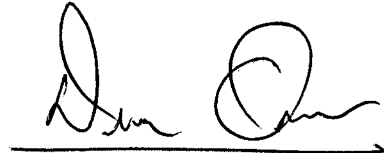
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