IN THE SUPREME COURT OF FLORIDA

ARTHUR D. RUTHERFORD, :

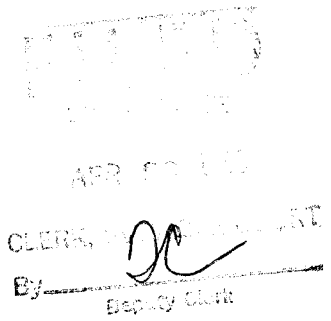
Appellant, :

v. : CASE NO. 69,825

STATE OF FLORIDA, :

Appellee. :

_____ :



REPLY BRIEF OF APPELLANT

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# REPLY BRIEF OF APPELLANT

## PRELIMINARY STATEMENT

Arthur D. Rutherford relies on his initial brief to reply to the State's answer brief with the following additions to Issues I and VII.

## ARGUMENT

### ISSUE I

ARGUMENT IN REPLY TO THE STATE AND IN SUPPORT OF THE PROPOSITION THAT THE TRIAL COURT LACKED JURISDICTION TO TRY RUTHERFORD'S CASE SINCE THE GRANTING OF THE MISTRIAL AT THE CONCLUSION OF THE FIRST TRIAL ON THE GROUND OF KNOWING AND WILLFUL PROSECUTORIAL MISCONDUCT ACTS AS A DOUBLE JEOPARDY BAR TO THE SECOND TRIAL.

The State has made three arguments in response to this issue. First, the State claims that the mistrial should not have been granted in the first instance because no discovery violation existed. (State's brief, pages 7-10) Second, the argument is made that any double jeopardy claim was waived because Rutherford did not raise the issue before the second trial. (State brief, pages 10-11) And, third is a conclusory assertion that the prosecutor's conduct was not designed to provoke a mistrial. (State's brief, pages 11-12) These arguments are without merit.

Judge Lowery correctly found a knowing and willful violation of the discovery rules and the court's pretrial discovery order. (R 106-111) The prosecutor never claimed that he had complied with his obligation to disclose the statements. In fact, he admitted that the brief reference in a deposition of Deputy Pridgen about "pull[ing] a job on an elderly lady" was the only possible notice of the statement about which Cook testified. (PT 395) This did nothing to give counsel notice of the scope of the statement. The mere opportunity to depose a witness does not cure the discovery violation. See, McClellan

v. State, 359 So.2d 869, 873-874, 878 (Fla. 1st DCA 1978); Lavigne v. State, 349 So.2d 178 (Fla. 1st DCA 1977). Moreover, counsel was entitled to rely on the State's discovery answer which said the witness would not testify to any statements. See, Kilpatrick v. State, 376 So.2d 386, 388 (Fla. 1979). No possible notice of the Pittman testimony existed. Additionally, the prosecutor's claim that he did not know the complete details of the Pittman statement until the day before the witness testified did not excuse him from his continuing duty to disclose. Presenting this testimony without notice was flagrant misconduct.

The State also suggests that defense counsel did not timely object to the discovery violation, and as a result, the trial court abused its discretion in granting a mistrial. (State' brief, page 7) Before granting the mistrial, the trial court considered the timeliness of the objection and concluded that defense counsel had sufficiently complied with the contemporaneous objection requirement. (R 106-111) Furthermore, the contention that defense counsel should be faulted for failing to anticipate the prosecutor's surprise testimony defies logic. The State gave the defense no notice of the oral statements. This was not a case of late notice; counsel's first notice came from the witnesses as they testified. Indeed, the prosecutor intentionally withheld notice to avoid an objection before the testimony was presented in order to preclude exclusion of the evidence as a sanction. (See discussion on pages 21-22 of the initial brief)

Next, the State contends that Rutherford did not preserve the double jeopardy claim because he did not object or file a motion before the second trial. In State v. Johnson, 483 So.2d 420 (Fla. 1986), this court held "that the failure to timely raise a double jeopardy claim does not, in and of itself, serve as a waiver of the claim." 483 So.2d at 423. Although there are "limited instances in which a defendant may be found to have knowingly waived his double jeopardy rights," Ibid., this case is not one of them. The holding in Johnson is applicable here.

Finally, the State alleges that the prosecutor's actions were not designed to provoke a mistrial and relies on State ex rel Gibson v. Olliff, 452 So.2d 110 (Fla. 1st DCA 1984) for support. However, Gibson is easily distinguishable because the prosecutor there merely acted negligently. The prosecutor here was guilty of intentional, willful misconduct. (R 106-111) Furthermore, the record here demonstrates that the prosecutor had much to gain in securing a mistrial--avoiding the sanction of exclusion of critical evidence. (See initial brief at pages 21-22) An objective view of the facts shows that the prosecutor intended to provoke a mistrial.

## ISSUE VII

ARGUMENT IN REPLY TO THE STATE AND IN SUPPORT OF THE PROPOSITION THAT THE TRIAL COURT ERRED IN GIVING THE STANDARD PENALTY PHASE JURY INSTRUCTION WHICH DIMINISHES THE RESPONSIBILITY OF THE JURY'S ROLE IN THE SENTENCING PROCESS.

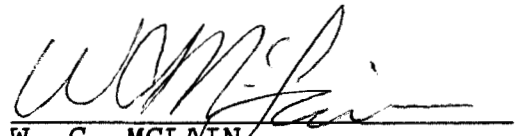
On March 7, 1988, the Supreme Court of the United States granted certiorari in Dugger v. Adams, Case No. 87-121, to review the decision of the Eleventh Circuit Court of Appeals in Adams v. Wainwright, 804 F.2d 1526 (11th Cir. 1986), amended on rehearing, 816 F.2d 1493 (11th Cir. 1987). One of the issues raised is similar to the one presented here. The State is asking the Supreme Court to resolve the conflict which now exists between this Court and the Eleventh Circuit on this question. A ruling in Adams could affect this Court's decision in this case.

## CONCLUSION

Upon the reasons presented in his initial brief and this reply brief, Arthur D. Rutherford asks this court to reverse his judgments and sentences and remand this case to the trial court with directions to discharge him. Alternatively, he asks that his death sentence be reduced to a life sentence.

Respectfully Submitted,

MICHAEL E. ALLEN
PUBLIC DEFENDER
SECOND JUDICIAL CIRCUIT



W. C. MCLAIN
ASSISTANT PUBLIC DEFENDER

Attorney for Appellant

## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have hand delivered a copy of the foregoing to the Attorney General's Office, The Capitol, Tallahassee, Florida on this 29 day of April, 1988.

W. C. MCLAIN