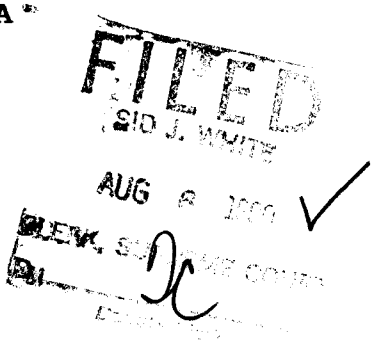
IN THE SUPREME COURT OF FLORIDA



CASE NO. 75,599

McARTHUR BREEDLOVE,

Appellant

vs.

THE STATE OF FLORIDA,

Appellee.

****

AN APPEAL FROM THE CIRCUIT COURT OF THE ELEVENTH JUDICIAL CIRCUIT IN AND FOR DADE COUNTY, FLORIDA CRIMINAL DIVISION

****

BRIEF OF APPELLEE

ROBERT A. BUTTERWORTH
Attorney General
Tallahassee, Florida

RALPH BARREIRA
Florida Bar No. **0374490**
Assistant Attorney General
Department of Legal Affairs
Ruth Bryan Owen Rohdes Building
401 N. W. 2nd Avenue, Suite N921
Miami, Florida 33128
(305) 377-5441

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INTRODUCTION

Appellee, **the State of Florida**, was the prosecution in the trial court and Appellant, **McArthur Breedlove**, was the defendant. The parties will be referred to as they stood in the lower court. The symbol "T.T." will refer to the transcript of the original trial, "R.D.A." will refer to the record on direct appeal, and "S.R.D.A." will designate the supplemental record on direct appeal. This Court has ordered that the above direct appeal transcripts and records be incorporated in the record herein. The symbol "R." will designate the record of the 3.850 proceedings below, and "S.R." will refer to the supplemental record of the 3.850 proceedings below. All emphasis is as in original unless otherwise specified.

STATEMENT OF THE CASE

The State accepts the defendant's Statement of the Case as accurate.

STATEMENT OF THE FACTS

The most critical facts relating to the single issue raised by the defendant are contained in the transcript of the motion to suppress. The State would summarize this testimony as follows:

Officer Leonard Broom

On November 8th, 1978 (three days after the instant murder), Officer Broom was on patrol in the area of the homicide when he received a BOLO for a prowler, at 11:33 p.m., at a residence at 160th Court and N.E. 11th Avenue (the homicide occurred at 1315 N.E. 146 Street, 14 blocks south and two blocks east of the prowler report). The BOLO described a black male wearing a colored T-shirt and dark pants. After receiving the BOLO Officer Broom observed the defendant walking east on 163rd Street at N.E. 12th Avenue (three blocks north and one block east of the prowler report) (T.T. 45, 46). Ofc. Broom stopped and questioned the defendant who stated that he had been walking home from Opa Locka (an area several miles to the west) when a white male had suddenly chased him with a gun for no reason. The defendant gave the name Lester Breedlove (along with a fictitious date of birth), and was sweating profusely (T.T. 47, 48). Using the name and D.O.B. given by the defendant, Broom checked with the computer, which showed no criminal record. At that point Ofc. Hyre of the North Miami Beach Police Department arrived

(Ofc. Broom is a Metro-Dade Officer), as did Ofc. Howard of the North Miami Beach Police Department, and Ofc. Broom departed. (T.T. 49).

Officer James Hyre

Officer Hyre responded to the prowler call at a residence located at 160 Court and N.E. 11th Avenue (T.T. 65). The residents reported that the prowler had headed north (the defendant was stopped three blocks north and one block east of that residence). (T.T. 66). Ofc. Hyre then proceeded to where Ofc. Broom was questioning the defendant. The defendant gave the name Lester Breedlove and a date of birth. The defendant stated he had been innocently walking in the area of the residence when, for no apparent reason, a white male began chasing him with a gun. (T.T. 67, 68). The defendant said he had never been arrested, and offered to wait around while the computer check was run (on his false name and D.O.B.). The defendant stated he lived in the Washington Park area of North Miami Beach. His mother's residence, where he was living, was located at 153rd Terr. and N. E. 14th Ave. (seven blocks north and one block east of the murder locale, and seven blocks south and three blocks east of the prowler incident) (T.T. 69, 70).

Officer Hyre believed the defendant's story, so he decided to let him leave. At that point Ofc. Howard (also of the North

Miami Beach Police Department) pulled up. Ofc. Howard asked if the departing person was the subject stopped pursuant to the BOLO, and what name he had given. (T.T. 70). When Ofc. Hyre told Ofc. Howard about a large scar on the defendant's forehead, Howard told Hyre that the subjects real name was McArthur Breedlove. Ofc. Hyre immediately caught up with the defendant and called out "Lester." When the defendant replied "yes," Ofc. Hyre gave the defendant his miranda rights with the intention of arresting him for obstruction by a disguised person. (T.T. 72).

The defendant told Ofc. Hyre that he was willing to talk to the officers, but he insisted his name was Lester Breedlove. (T.T. 74). Ofc. Howard, who had followed along, told Ofc. Hyre that the man he knew as McArthur Breedlove had a large scar on his abdomen. Hyre then raised the defendant's shirt and observed such a scar on the defendant. (T.T. 75).

Officer Hyre then handcuffed the defendant and took him to the residence where the prowler call originated. The female victim stated that she had been preparing for bed when she saw a man looking at her through her bedroom window. She screamed, and her father ran outside and yelled at the man. Her father then identified the defendant as the man he saw outside his daughter's window. (T.T. 75-80). The defendant was then charged with loitering and prowling as well.

Officer Charles Howard

Officer Howard saw Officer Hyre questioning the defendant and decided to stop and investigate. As he arrived the defendant was leaving, and Howard thought he recognized him, so he asked Officer Hyre what name the defendant had given. Howard believed he knew the defendant as McArthur Breedlove. (T.T. 97, 98). Ofc. Howard remembered the defendant from a 1977 burglary investigation, where the defendant had also given the name Lester Breedlove to the investigating Officers. It was at that time that he learned that the defendant's real name was McArthur Breedlove, and that there was a California fugitive warrant listing the alias' of "Lester Breedlove" and "McArthur Jenkins". (T.T. 99).

Detective Randolf Nagel

Detective Nagel was a homicide investigator with the Hallandale Police Department in Broward County. On November 10th, 1978, he learned of the defendant's arrest for the instant murder. He remembered the defendant's name from a prowler report which was contained in the file of an unsolved 1974 Hallandale murder. (T.T. 112, 113) (a fatal stabbing of a 63 year old woman during a burglary of her residence, T.T. 331).

Detective Nagel contacted Detective Ojeda on November 10th, 1978 and was provided with the details of the instant murder. After reviewing his own file from the 1974 murder, Detective Nagel obtained the defendant's fingerprint standards from Ojeda. The defendant's prints matched those found in the 1974 victim's residence. (T.T. 114-115).

On November 21st, 1978, Detective Nagel contacted Detective Zatrepalek to arrange an interview of the defendant, who was being held in the Dade County Jail. Zatrepalek told Nagel to come down later that same morning (T.T. 116). Detective Nagel drove to the Metro Dade Homicide Office, but was told by Detective Zatrepalek that the defendant wanted to speak with his mother before being questioned. (T.T. 117).

Sometime later Detective Zatrepalek returned and informed him that they had located the mother, and that she and the defendant were together. After the defendant's mother left, Zatrepalek told him the defendant was willing to talk to both Detectives about their respective murders, and Detective Zatrepalek was going to question the defendant first. Detective Zatrepalek also told Nagel that when the defendant had been informed about the fingerprint match-up in the Hallandale case, the defendant had stated "If they got my prints, I must have done it. (T.T. 118).

Around 5:00 p.m., still on the 21st, Detective Nagel and his partner, Sgt. Mance, were finally able to see the defendant. The defendant was not in any physical distress and appeared perfectly normal. The defendant was calm and cooperative, and, because of the late hour, agreed to give a statement the following day. (T.T. 119). As he was preparing to leave, Detective Nagel told the defendant they had "made him" on prints, to which the defendant replied "You got my prints, then I must have done it." (T.T. 120).

Detective Nagel and Sgt. Mance returned the next day. The defendant was already at the homicide office with Detective Zatrepalek. As they entered the office and sat down, the defendant stated "I will tell you everything. I did yours" pointing to Zatrepalek -- "and I did yours", pointing to Nagel's case file on the desk. (T.T. 121). The defendant was friendly and cooperative throughout. After Nagel informed him of his Miranda rights, the defendant gave a statement as to the 1974 Hallandale murder. (Id).

Mary Gibson

Ms. Gibson is the defendant's mother, who was called out of turn by the defense for purposes of convenience. She was questioned extensively concerning the consent she gave the police to search her residence, and whether she understood the contents

of the consent to search form, (she said she did not), (T.T. 141), which is not directly germane to the instant claim. She did offer the following testimony relative to the issues presented herein.

Police officers came to her home on November 21st, 1990, and told her that her son needed to talk to her at the jail. Once at the station one of the Detectives told her that the defendant needed to talk to her about some problems he had, and she was brought to a room in which the defendant was seated (T.T. 134, 135). According to Ms. Gibson, she talked to the defendant for about five minutes. The defendant stated he was in a lot of trouble, and they both became very emotional. The defendant said he was doing okay, and did not say anything about mistreatment by the police. The defendant did say, when asked by his mother what kinds of problems he had, "Momma, I see the condition you are really in. I don't want to put no more pressure on you," which caused her to break into tears. (T.T. 136, 137). The defendant said he felt badly about how all this was affecting her, and he told her "Don't cry and don't worry." (T.T. 137).

Ms. Gibson learned later that in a telephone call to his brother's home, he accused the police of beating him. (T.T.138). During the search of her home the Detectives confiscated a screwdriver from the kitchen sink. (T.T. 142).

On cross-examination by the state, Ms. Gibson stated that the Detectives were always nice and polite. (T.T. 144). The defendant slept on a couch in her living room. (T.T. 146). The officers that drove her to the station were polite, and she had as much time to talk to the defendant as she wanted: "They didn't hassle me at all." (T.T. 149). When she first began talking with the defendant he was happy and smiling, with the crying coming later on. His physical appearance was fine and he said nothing about mistreatment. (T.T. 150).

At the conclusion of their meeting the defendant said he wanted to talk to the detectives. The defendant never mentioned his lawyer. The Detectives appeared to be treating the defendant well. (T.T.151).

Detective Julio Ojeda

Detective Ojeda was assigned to the instant murder November 6th, 1978. He learned that a blue ten-speed bicycle had been stolen two houses down from the victim's residence the night of the murder. (T.T. 155-157). On November 9th he received a report from Ofc. Howard concerning the defendant's loitering and prowling arrest on November 8th. That same day (the 9th) Ojeda went to the defendant's residence and observed a blue ten-speed bicycle, matching the owner's description, in the yard of the defendant's residence. (T.T. 162). He retrieved the bicycle's

owner, who identified it as the bike stolen the night of the murder. (T.T. 166).

At this point, he requested consent from the defendant's mother to search the residence, which was granted. (T.T. 168). He located a screwdriver under cushions of the couch where the defendant's mother said he slept. (T.T.169). He also confiscated a pair of sneakers, and in a trash pile beside the house he discovered clothing with red stains. (T.T. 170).

Ms. Gibson told Ojeda that the defendant brought the bike home in the early hours of Monday morning (the murder occurred approximately 1:30 a.m. Monday morning). She also told Ojeda the defendant had left home Sunday night with long pants, but returned with the pants legs cut off. (T.T. 177). Ojeda later learned from Detective Zatrepalek that the defendant's brother, Elijah Gibson, stated that the defendant had left that Sunday evening on foot wearing black and white pants, then returned around 3:30 a.m., Monday morning with his pants cut off, and in possession of a rhinestone watch. The defendant refused to tell Elijah where he obtained the watch, but said his pants were cut off because he was in a fight. Upon returning that night, he threw the clothes he was wearing in a dumpster outside the house. (T.T. 178).

At approximately 6:00 p.m., still November 9th, Detectives Ojeda and Zatrpalek brought the defendant to the homicide office from the adjacent Dade County Jail (where the defendant was being held on the Obstruction, and Loitering and Prowling charges described above). They interviewed the defendant in the Administrative Officer's office, where they could be observed by the other members of the Homicide staff. (T.T. 179, 180).

Ojeda introduced himself, and told the defendant to call him "OJ", and call Zatrepalek "Charlie." They then gave the defendant his miranda rights waiver form. (T.T. 181-185). The defendant never indicated that he wanted a lawyer, or wanted the questioning to cease. (T.T. 185).

The defendant stated he was in jail for loitering and prowling, and that he had been in Miami two months since returning from California, where he had been in jail, and that since his return the police had been harassing him by stopping him while walking through residential areas at night, and asking him what he was doing there. (T.T. 186). The defendant stated he sometimes used the last name "Jenkins".

On the night of the murder he had brought some wine at the convenience store near his home. At this point he claimed he was on foot. (T.T. 187). The Detectives then asked if he owned a blue ten-speed bicycle, which the defendant at first denied.

They then informed him of their discovery of the bike, and the statements of his mother and brother concerning his appearance with the bike the morning of the murder. The defendant again denied possessing the bike. They then told him about his brother's statement about the rhinestone watch, at which point he admitted stealing the bike, because he got tired on his walk home. (T.T. 188). The defendant admitted speaking to his brother upon arrival home that morning, but denied showing him a watch. (T.T. 189).

The Detectives then told the defendant his brother had seen blood on his cut-off pants, and the defendant responded that there had been no blood. When told that his mother has seen the same thing, he experienced a moment of "total recall", stating "Oh, that's right. I had gotten into a fist fight at the U'Totem, and that's how I got blood on my pants." (T.T. 190). The defendant also admitted throwing his bloody clothes into the dumpster outside his house.

At this juncture in the questioning, Detective Zatrepalek was called out of the room. Ojeda continued the questioning, and in particular how the defendant came into possession of the bike. Ojeda told the defendant he did not believe his story about the bike, and the defendant stated "OK, I took the bike two houses down from the murder. When Ojeda shot back, "what murder," the defendant refused to discuss the subject further. (T.T. 191).

Upon Zatrepalek's return, they continued questioning the defendant about the bicycle, and the defendant responded that they were trying to frame him, and that his brother Elijah was a liar. (T.T. 192). They then asked him about his cut-off bloody pants, and the defendant responded by again accusing them of harassing and seeking to frame him, and he insisted the blood was from a street fight. (Id).

At this juncture Ojeda told the defendant that he believed the defendant had entered the house on 146th Street, gotten in an altercation, and stabbed "someone." The defendant replied, "No, you can't find me in that house, because you ain't going to get my fingerprints in that house," and "Now, I suppose you'll tell me that the blood on my pants belongs to the man." (T.T. 193). Ojeda believed this latter reference to a "man" was important because Ojeda never mentioned the sex of the victim. The defendant then kept insisting that they would never find his prints in the house. (Id). When asked why he threw away his clothes, the defendant said he didn't want clothing with blood on it lying around. (T.T. 194).

Detective Zatrepalek again was called out of the room (to respond to a telephone call). The accusations and denials continued along the same lines, with the defendant challenging the Detectives to take his fingerprints. (T.T. 194). Ojeda asked why the defendant knew they wouldn't find his prints, and the

defendant looked at him and said, "You are not going to find my fingerprints in there. I was wearing socks." (T.195). When Ojeda attempted to question the defendant about the socks, the defendant would say only that he did not have them anymore. (Id). The defendant was then taken upstairs and fingerprinted.

After returning from being fingerprinted, they continued talking with the defendant. He stated that from the time he arrived in California, he had been constantly harassed by the police. They would stop him for no reason while he walked through residential areas, and that one time after he had broken into a house and was attempting to "subdue" a white female, a cop had broken in the front door and shot him in the stomach. For this he was placed in a sexual offender program. (T.T. 196).

Ojeda stated that they began their questioning around 6:15 p.m. and concluded around 9:15 p.m., with an interruption while the defendant was fingerprinted at approximately 7:30 p.m.

Detective Charles Zatrepalek

On November 21st, 1978, he received a call from Detective Nagel of the Hallandale Police Department, who wanted to interview the defendant concerning a Hallandale homicide. (T.T. 223). He arranged to have Nagel meet him at the homicide office, and for the defendant to be brought over from the jail. When

Detective Zatrepalek met the defendant at the homicide office, he told him that some Hallandale detectives wished to speak with him, and Detective Zatrepalek read the defendant his miranda rights. (T.T. 223). The defendant then signed a rights waiver form. (T.T. 225).

At this point the defendant said he wanted to speak with his mother before talking to the Detectives. Zatrepalek agreed and sent officers to locate his mother, who did not have a telephone. While they waited for his mother, the defendant was served lunch. (T.T. 229). The defendant's mother, Mary Gibson, arrived around 1:00 p.m., and Zatrepalek took her to the office where the defendant was located, and asked if they wanted to be alone, which they did. They were together approximately twenty-thirty minutes. As Ms. Gibson left, she said the defendant wanted to talk to the Detectives. (T.T. 232). The defendant at this juncture appeared in a normal condition.

Detective Zatrepalek began by asking the defendant "what do you want to talk to me about," and the defendant replied "the murder." When Zatrepalek then asked which one, the defendant stated "the one we were talking about before." The defendant then admitted that he had entered the instant victim's home around 1-1:30 a.m. through an unlocked back door, armed himself with a large kitchen knife, rummaged through a purse, entered the bedroom, struggled with and stabbed the male occupant, then left,

grabbing a bicycle a couple of houses away as he fled. (T.T. 233, 234). Detective Zatrepalek then asked the defendant if he would give a formal statement, and after Zatrepalek explained what this would entail (Court Reporter, transcript, etc.), the defendant agreed. (T.T. 234). After the defendant gave the formal statement, it was immediately transcribed, and the defendant made two minor corrections. (T.T. 235). The formal statement was read into the record at trial. (T.T. 1037-1051).

At no time did Detective Zatrepalek threaten the defendant or offer him any inducements to obtain his statement. (T.T. 239). At the conclusion of the formal statement, Zatrepalek told the defendant that the Hallandale Detectives were waiting to speak with him, and the defendant said he didn't feel like talking with them today, but would speak with them tomorrow. (T.T. 240).

The following day the defendant was brought from the jail to the homicide office at 11:00 a.m., and Detective Zatrepalek again advised the defendant of his Miranda rights. (T.T. 242). When Detective Nagel walked into the interview room the defendant pointed to Zatrepalek and stated "I did his," then pointed at Nagel's case file and said, "I also did yours." At that point Zatrepalek asked the defendant if he was willing to talk with Detective Nagel, and the defendant replied that he was. (T.T. 247).

On cross-examination, Zatrepalek stated he was not sure which Detectives picked up the defendant from the jail on November 21st, 1978, but that one may well have been John LeClaire. (T.T. 256). Zatrepalek had no plans for interviewing the defendant on November 21st, rather the arrangements were made on behalf of Detective Nagel, so that Nagel could interview him concerning the 1974 Hallandale homicide. (T.T. 263). Zatrepalek never physically abused or intimidated the defendant, and he is not aware of anyone else doing so. (T.T. 265). Detective Ojeda was not present during any of the activities of November 21st or 22nd, 1978, described above. (T.T. 266). On the 21st, after his mother departed, the defendant specifically asked to speak to Detective Zatrepalek. (T.T. 268).

At this juncture, the State rested. In addition to Mary Gibson, whose testimony is summarized above, the defendant called the following witnesses:

Robert Shultz

Schultz is the jail counselor for the 6th floor of the Dade County Jail, where the defendant was incarcerated during November of 1978. He was the defendant's counselor, and his job was to help the defendant adjust to the jail environment, meet any special needs, answer questions, and in general assist the defendant in whatever way he could. (T.T. 274-275).

On November 21st, 1978 (Schultz was initially unsure of the exact date, but later produced a log book confirming the date), two plainsclothes Detectives picked up the defendant from the jail. (T.T. 275). He did not know their names, and could offer only a general description of one. Due to a lack of jailors, Schultz was asked to bring the defendant from his cell to the where the detectives were waiting. When Schultz advised the defendant that there were detectives who wanted to see him, the defendant said "they had better be the ones I want to talk to," or "I don't want to take to certain detectives," or something similar thereto. (T.T. 276). When the two of them reached the waiting area, the defendant saw the waiting detectives and said "I am not talking to them," and one of the detectives replied, "eventually you will talk to us." (T.T. 276). Schultz does not remember what, if anything was said after that. (T.277).

On cross examination, Schultz stated he does not remember the defendant ever mentioning or asking for his attorney. (T.T. 280). It is Schultz' job to report improper police behavior, and he did not see the Detectives do anything improper with the defendant. (T.280). During his entire tenure as the defendant's counselor, the defendant never complained of nor showed any signs of physical abuse by the police. Schultz was the person whom the defendant would have reported such abuse to had it occurred. (T.T. 281).

Schultz was subsequently recalled and, using his log book, confirmed the date of the above events as November 21st, 1978. (T.T. 303). He also stated on cross-examination that the defendant had an absolute right to refuse to leave his cell to talk with the Detectives, and that had he refused it would have been recorded in the log book, which in fact contained no such entry. (T.T. 304).

David Finger

Finger was an Assistant Public Defender, who interviewed the defendant in the jail on November 4th, 1978, five days after the defendant's first discussions with the Detectives and one week prior to the defendant's November 21st confession. (T.T. 284-286). Finger and another Assistant Public Defender told the defendant not to speak with anyone unless they were present. The defendant told them he had not spoken to anyone yet. (T.T. 287). The defendant then said he had been beaten, but had refused to give a statement. (Id).

On cross-examination Finger said the defendant had no signs of a beating and did not appear in any physical distress. (T.T. 288). Finger admitted there is nothing to substantiate the defendant's claim that he was beaten. The defendant had claimed he was beaten by the Detectives, but that he was immediately

returned to his cell when he refused to give a statement after his beating. (T.T. 289). The defendant told Finger he wanted to speak with his family. The defendant did not know the names of the persons who had supposedly beaten him, and did not even specifically say it was the Detectives who beat him. The defendant provided no specifics whatever. (T.T. 289, 290).

After Finger received discovery and learned of the formal statement the defendant gave November 21st, he asked the defendant why he gave the statement. The defendant said the detectives had threatened him with another beating and had "harassed" him and that he confessed to avoid another beating and further harassment." (T.T. 291). The defendant again failed to identify the officers who beat him or provide any specifics. (T.T. 292). Finger states that there is absolutely no evidence to support the defendant's claim that he was beaten, and to his knowledge none of the Assistant Public Defenders ever bothered to conduct a follow-up investigation of the defendant's allegation. (T.T. 296).

At their initial meeting on November 14th, not only was the defendant unable to provide the names of his tormentors, he could not even provide a physical description. (T.T. 297). Also at this first interview, the defendant had been escorted to his attorneys with another of their clients, one who had confessed his crime to the police. Finger has a vivid recollection of the

defendant chiding this other inmate for being stupid enough to confess, stating "Oh, you confessed to the police. They beat me and I didn't confess," and "They beat me and they didn't get a confession out of me. " (T.T. 298). This occurred prior to their actual interview of the defendant. (Id).

Finger concluded by offering the following observation, one which speaks volumes about the instant claim. When asked if he told anyone about the defendant's allegations, he stated "No. I get those complaints all the time. I don't report them all the time, no." (T.T. 299).

As a final note on Finger's testimony, he made it clear on redirect that he had tried to obtain details from the defendant about his alleged beating:

REDIRECT EXAMINATION

BY MR. ZENOBI:

Q. Regarding the first interview, was there any mention to you as to who in a law enforcement capacity had done the beating; for example, officers, detectives, anybody like that?

A. As best I can recall, he just said "some officers" or "some detectives" who were questioning him. He did not know the names. We asked him if he could describe them or if he knew the name. He couldn't tell us.

He said the people questioning him about the incident had beaten him. He wasn't any more specific.

(emphasis added, T.T. 297).

The Defendant

The defendant recalls his first encounter with the Detectives on November 9th, 1978. He refers to Detectives Zatrepalek and Ojeda as Officer Charlie and the "big heavy stout guy." (T.T. 308). At that meeting both officers beat him with fists on his stomach and chest in the homicide office. After the beating, he was taken back to the jail. (T.T. 309). When he was interviewed by his attorneys on November 14th, they did not ask him to provide any details of the beating.

On November 21st, he did not want to talk with the Detectives because of the prior beating. (T.T. 312). On that date, he was brought downstairs and confronted by Officer Charlie and the same "heavy stout guy" (Detective Ojeda, who as the defendant notes at page 8, n.16 of his brief, was not present because he was on injury leave from a back injury.) (T.T. 945). The defendant attempted to refuse to leave with the Detectives, but they said he was going regardless. (Id).

They took him to the homicide office and threatened him with another beating if he didn't confess. The defendant immediately asked for his lawyer, and showed the Detectives his

attorney's business card. They told him an attorney was a waste of time, "because they were going to get a confession.." They told him the Public Defender's Office wanted to make a name for themselves handling his case. (T.T. 313). They told him if he confessed he would go to the hospital instead of the electric chair, and that he would get the chair "If I took the P.D.'s office." (T.T. 314).

The defendant told them that he wanted to see his mother. The defendant planned to tell his mother about the beating, and have her notify his attorney. However once she arrived, he decided that she would probably spill her guts to Officer Charlie because "he got in pretty good with my mother" (T.T. 314), and therefore the defendant did not tell his mother about his predicament. After his mother left, the Detectives again threatened him with another beating, and that is why he confessed. (T.T. 315).

On cross examination, he stated that he executed each of the rights waiver forms because he was afraid. (T.T. 321). He understood all his rights, but confessed out of fear. (T.T. 322). When he was brought to the homicide office on November 21st, he was literally kicking and screaming, and a half dozen people witnessed his vehement protestations. (T.T. 325). He did not tell his mother what was going on because he feared she would tell Officer Charlie, and then he would get another beating. In

fact, he didn't talk to her at all. What made him suspicious of his mother was that he was left alone in the room with her. The defendant figured that he was left alone with his mother so he could tell her about the beatings and threats, then she would tell Officer Charlie about his revelations, and then Officer Charlie would have a good reason to beat the defendant again, (T.T. 330, 331),or something like that.

The defendant denied that he trusted Officer Charlie. The prosecutor then asked the defendant if he had specifically requested Officer Charlie's presence on November 22nd, 1978, when he confessed to Detective Nagel the multiple stabbing murder of a 63 year old woman in her apartment. The defendant first replied, "No", and then "No Sir, not to my knowledge." (T.T. 331, 332).

The defendant stated that he began crying in his mother's presence not, as the prosecutor suggested, because the truth hurt, but rather because he was in physical pain from his chest. (T.T. 332). The defendant denied telling his mother that he wanted to talk to the Detectives after she left. (T.T. 333).

The defendant stated that he was in fear when talking with Officer Charlie after his mother left, and that "Under fear, I would have said anything." (T.T. 334). He would have confessed to anything to avoid another beating. (T.T. 236). The defendant stated that the confessions were true, but that he only gave them out of fear. (T.T. 337).

Earlier on (T.T. 317, 318), the defendant had denied having earned four felony convictions for his antics in California, insisting he had only one conviction. The prosecutor again tried to get the defendant to admit to his four felony convictions, and the defendant again denied them. (T.T. 338). The defendant may have been confused, or perhaps not, but for the record, the trial court was indeed aware of the number (relevant to the defendant's credibility at the suppression hearing) and nature (relevant to the sentencing phase aggravating factors) of his California convictions, which stemmed from two separate burglary/attempted rape episodes. (R.D.A. 184). Of course, only the number is relevant here, along with the defendant's denial of that number.

The defendant was then questioned about a statement he gave to Detective Zatrepalek on November 25th, 1978, concerning a late night rape in a residence six blocks from the instant murder. The defendant was asked if he had insisted on talking to Officer Charlie about the rape, rather than the lead detective on the rape case, and the defendant replied, "I don't remember that" and "No, I don't remember that, your honor." (T.T. 339, 340).

The defendant used the name McArthur Jenkins in California, which was the name he was convicted and imprisoned under there, (T.T. 341), which is interesting since he had just stated he did

not do any time in California. (T.T. 338). The defendant stated he would have confessed to any crime Officer Charlie asked him about due to his fear of another beating.

On redirect, he testified that if he had told the court reporter, at the formal statement, about the beatings, the Detectives probably would have killed him. (T.T. 345).

The State then called Detective Zatrepalek in rebuttal.

Detective Charles Zatrepalek

He did not physically abuse the defendant or threaten or coerce him in any way. He also did not pick up the defendant at the jail on November 21st. The defendant never asked to speak with his attorney. (T.T. 348, 349). He did not promise the defendant he would go to a hospital instead of the electric chair if he confessed. (T.T. 350).

On November 22nd, 1978, he brought the defendant to Detective Nagel and Nagel's partner, and then started to leave, but the defendant specifically asked him to stay. (T.T. 350-351).

On November 25th, 1978, he introduced the defendant to Detective Bryda of the sexual battery unit, who wished to question the defendant about a rape in which the defendant was a

suspect. The defendant refused to discuss the rape with Detective Bryda, insisting instead on giving his statement to Zatrepalek. (T.T. 351-352).

ISSUE PRESENTED

I.

WHETHER THE TRIAL COURT ERRED IN SUMMARILY DENYING THE DEFENDANT'S BRADY CLAIM.

SUMMARY OF THE ARGUMENT

The State will briefly address the suppression prong of the defendant's Brady claim at the conclusion of its brief, however this Court need not look beyond the materiality issue in deciding this cause, because the defendant has utterly and miserably failed to demonstrate the remotest possibility, much less a reasonable probability, that the undisclosed evidence of the Detective's cocaine use and other crimes would have changed the outcome below. To put it bluntly, the suppression hearing transcript literally screams *LIAR!!* at the defendant's totally unsubstantiated and indeed ridiculous claim of being pummeled and threatened into confessing. That transcript, summarized in minute detail above, and largely (and understandably) ignored by the defendant in his brief, blows the defendant's Brady claim so far out of the water that it might as well sprout two mirrors, aim at the heavens and start snapping pictures.

In short, the defendant's allegation of a beating and threats was shown to be, from every witness at the hearing, including all three of his own witnesses (his mother, his attorney, and his counselor), a big fat lie. It is not simply that the defendant's allegation was totally unsubstantiated, as it surely was at trial and remains so to this day. Rather, the defendant's allegation is positively refuted by every strand of evidence below, not the least of which is the defendant's own

thoroughly bogus testimony at the hearing. The evidence of the Detective's wrongdoings was totally unrelated and hence inadmissible, but even had the judge or jury learned of their transgressions, the result would not have changed given the overwhelming evidence of the voluntariness of the defendant's confession.

ARGUMENT

THE TRIAL COURT PROPERLY DENIED THE DEFENDANT'S BRADY CLAIM WITHOUT AN EVIDENTIARY HEARING.

In United States v. Bagley, 473 U.S. 667 (1985), the Supreme Court in essence adopted the prejudice test from Strickland v. Washington, 466 U.S. 668 (1984), as the test for materiality under Brady v. Maryland, 373 U.S. 83 (1963). In order to establish materiality, i.e. prejudice, the defendant must demonstrate a reasonable probability that the outcome would have been different. Applied to the instant facts, the defendant must demonstrate that had the trial court or jury learned of the Detective's cocaine use and other criminal activity, and that Detective Ojeda had been questioned by internal security officers concerning allegations he received cocaine and jewelry from Mario Escandar, the judge or jury would have found the confession to be involuntary.

There are of course other elements of a Brady claim, i.e., whether the undisclosed information was "suppressed". However, one of the blessings of Bagley and Strickland is that if the reviewing court determines that any prong has not been met, the court need only address that unfulfilled prong.

The State respectfully asserts that this Court need deal only with the materiality prong, due to the defendant's pitifully inadequate showing as to this key aspect of his Brady claim. In his brief, the defendant devotes the lion's share of his factual and legal presentation to the suppression prong. The State will take the opposite approach in order to focus on the single dominant factor in this litigation; that all the evidence from all the witnesses at the suppression hearing, including the defendant's own incredible testimony, overwhelming demonstrate that the defendant's allegation of a beating and threats was pure unadulterated hogwash.

At the outset, the State must grant the defendant his due as regards one point in his brief, i.e., that the trial court should not have relied in part on the fact that the defendant's confession was corroborated by other evidence at trial. The State agrees that the reliability of the confession is irrelevant. If a confession is beaten out of a suspect it is involuntary and hence inadmissible regardless of its reliability. There exists, however, a veritable army of valid reasons supporting the trial court's ruling on materiality, all of which will be shortly addressed.

In terms of post-Bagley decisions regarding materiality, the most similar is that rendered by the Eleventh Circuit Court of Appeals, in Delap v. Dugger, 890 F.2d 285 (11th Cir. 1989).

In Delap v. State, 505 So.2d 1323 (Fla. 1987), this Court had found that the undisclosed impeachment evidence (that the lead investigator had been running a drug trafficking ring at the time of trial) was not "suppressed," and therefore this Court did not address the materiality prong. The Eleventh Circuit, in a testament to the flexibility of the Brady/Bagley doctrine, simply assumed arguendo (the Court italicized the word "*arguendo*," see n.16 at 298) that the evidence was suppressed within the framework of Brady. The Court then held:

> **V. BRADY CLAIM**
>
> Delap argues that the state suppressed evidence of a witness's involvement in drug smuggling in violation of *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963), and *Giglio v. United States*, 405 U.S. 150, 92 S.Ct. 763, 31 L.Ed.2d 104 (1972). On November 2, 1981, a federal grand jury indicted Chief Investigator Lem Brumley for conspiracy to import marijuana from Colombia which allegedly began prior to October 1, 1977 and continued through July 31, 1981. Brumley agreed to plead guilty on October 29, 1981, and was sentenced to three years in prison and ordered to pay a $5,000 fine on February 23, 1982. Delap contends that because Brumley was a key witness and a member of the prosecution team, the state was under a duty to disclose Brumley's illegal activities.
>
> **[7,8]** To establish a *Brady* violation, Delap must demonstrate (1) that the prosecution suppressed evidence (2) that was favorable to him or exculpatory and (3) that the evidence was material. *United States v. Blasco,* 702 F.2d 1315, 1327 (11th Cir.), *cert. denied,* 464 U.S. 914, 104 S.Ct. 275 & 276, 78 L.Ed.2d

256 (1983). We need not address the first two prongs of this test,[16] because we conclude that the evidence was not material.

The purpose of the *Brady* rule is to ensure that a criminal defendant receives a fair trial. *United States v. Agurs,* 427 U.S. 97, 112, 96 S.Ct. 2392, 2399, 49 L.Ed.2d 342 (1976). *United States v. Bagley,* 473 U.S. 667, 105 S.Ct. 3375, 87 L.Ed.2d 481 (1985), governs the standard of materiality to be applied in determining whether a conviction should be reversed because the prosecution failed to disclose requested evidence that could have been used to impeach government witnesses. The Court in *Bagley* held that such evidence

> is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. A "reasonable probability" is a probability sufficient to undermine confidence in the outcome.

473 U.S. at 682, 105 S.Ct. at 3383.

While *Bagley* was decided in the context of a request for impeaching evidence its materiality test is equally applicable to purely impeaching evidence that was not requested by the defense. *Id.* (test is "sufficiently flexible to cover the 'no request,' 'general request,' and 'specific request' cases of prosecutorial failure to disclose evidence favorable to the accused")' *see United States v. Severdija,* 790 F.2d 1556, 1560 (11th Cir. 1986) (Court in *Bagley* "appears to have announced a single standard for materiality of nondisclosed evidence").

Our examination of the circumstances convinces us that the evidence concerning Brumley's involvement in drug smuggling activities was not material under the *Bagley* test. Delap argues that exposure of Brumley's illegal activities to the

jury would have cast substantial doubt on his credibility. First of all, as the district court noted, it is highly questionable whether the evidence would have been admissible under Florida law. Brumley had not been charged or convicted of any crime during Delap's first or second trials. Brumley was not indicated until late 1981, well after Delap's October 1978 second trial. Therefore, his illegal activities would not be admissible as a prior criminal conviction under Fla.Stat. § 90.610. *See Rolle v. State*, 386 So.2d 3 (Fla. 3d Dist.Ct.App. 1980)(general rule is that witness may not be interrogated as to prior arrests or pending charges, but only as to prior convictions). Nor is it likely that the evidence would be admissible under Fla.Stat. § 90.608 as evidence of bias in this case, where no criminal proceeding or even an investigation had begun.

Second, like the district court, we believe that the result of the trial would have been the same regardless of whether Brumley's testimony was impeached. The physical evidence of Delap's guilt was strong, including, but not limited to Delap's confession,[17] the blood on his shirt, the matching descriptions of Delap and the victim struggling in Delap's car. This evidence was sufficiently powerful so that even had Brumley's testimony been impeached with evidence of drug dealing, there was not a reasonable probability that the outcome of Delap's trial would have been different.

Therefore, Delap's *Brady* claim must fail.

Id. at 298, 299.

The Court stated in footnote 17:

17. Brumley was not the only officer present during Delap's interrogation.

> Therefore, even if Brumley were impeached, the other officers present could testify as to Delap's confession.
>
> Id., at 299.

Before assessing the impact of the Eleventh Circuit's opinion in Delap, one salient feature of the instant case must be highlighted. At the motion to suppress, the defendant did not present one iota of evidence corroborating his bald assertion that he was beaten and threatened by Detectives Zatrepalek and Ojeda. One of his own attorneys, David Finger, called as a defense witness, readily conceded that there was nothing to support this allegation. Indeed, due in part to the defendant's inability to name or even described his alleged assailants, or provide any details whatever, finger gave the defendant's allegation no credence whatever. Likewise, in his 3.850 motion, the defendant again fails to present any corroborative evidence that he was beaten and threatened into confessing. He hangs his hat solely on the alleged impeachment value of the two Detectives criminal activities, and the fact that sometime during 1978, Detective Ojeda was questioned by internal security officers concerning an informant's allegation that he received cocaine and jewelry from Mario Escandar.

Turning to Delap, two important principles emerge. The first is that in order to be material, nondisclosed evidence must be admissible. In the instant case the evidence was inadmissible

for the same reason it was inadmissible in Delap; neither Ojeda nor Zatrapalek had been convicted of their crimes, and the evidence thus fell squarely within the confines of Fla.R.Evid. 90.404(1). As to Detective Ojeda, the defendant argues the evidence was admissible to show bias, under 90.608, because he knew about an earlier internal affairs investigation of his relationship with Mario Escandar (an investigation suspended due to lack of evidence). The State fails to comprehend how the Mario Escandar investigation biased Detective Ojeda against the defendant. The two cases were absolutely one hundred percent unrelated. The substance of his testimony against the defendant could have absolutely no bearing on the investigation of his association with Escandar. If internal affairs could prove he got drugs and gifts from Escandar, he was history. Period. Had Ojeda been under investigation for beating prisoners to obtain confessions, that would be a different ballgame, as noted by the trial court below. Even if we assume, arguendo, that Detective Ojeda did beat the defendant, he would already have every motive in the world to deny it at the motion to suppress, i.e., lose his job, face serious criminal and perhaps civil rights charges, etc. For the defendant to contend that Detective Ojeda's testimony was biased against the defendant because of his internal affairs investigation relative to Mario Escandar, is the equivalent of chasing rainbows while simultaneously grasping at straws.

In terms of confrontation clause concerns, there was no constitutional imperative requiring the admission of this evidence. As the Supreme Court noted Delaware v. Van Arsdall, 475 U.S. 673 (1986):

> It does not follow, of course that the Confrontation Clause of the Sixth Amendment prevents a trial judge from imposing any limits on defense counsel's inquiry into potential bias of a prosecution witness. On the contrary, trial judges retain wide latitude insofar as the Confrontation Clause is concerned to impose reasonable limits on such cross-examination based on concerns about, among other things, harassment, prejudice, confusion of the issues, the witness' safety or interrogation that is repetitive or only marginally relevant. And as we observed earlier this Term, "the Confrontation Clause guarantees an opportunity for effective cross-examination, not cross-examination that is effective in whatever way and to whatever extent the defense might wish." Delaware v. Fensterer, 474 U.S. 15, 20, 88 L.Ed.2d 15, 106, S.Ct. 292 (1985) (per curiam) (emphasis in original).
>
> 475 U.S. at 679, 683.

See also Francis v. State, 473 So.2d 672 (Fla. 1985), (evidence of witness' pending charge for murdering her husband not relevant to bias and thus properly excluded), and the very recent Eleventh Circuit decision in Francis v. Dugger, ___ F.2d ___, ___ FLW Fed. C___, (11th Cir., no. 88-6001, July 24th 1990), (witness' pending charge for murdering her husband properly excluded, citing above language from Van Arsdall).

The second principle emanating from Delap is that the admissibility issue can be bypassed altogether if the court finds, as it did in Delap, that even had the bad character evidence been admitted as impeachment, there is no reasonable probability that the outcome would have been different. In Delap, the relevant outcome was the guilty verdict, whereas here it is the outcome of the motion to suppress. However, the analysis is the same: look at the totality of the evidence of voluntariness presented in the trial court, to determine if the undisclosed evidence probably would have changed the outcome. Which brings us to the evidence presented at the motion to suppress.

The testimony at the suppression hearing is summarized at length above, but the highlights bear repeating. When the defendant is first stopped by Officers Broom, Hyre and Howard, he gives a false name and date of birth, falsely states that he has never been arrested, then graciously offers to wait while the computer check is run. He tells the officers he was walking innocently through a residential area when a man begins chasing him with a gun for no reason, which the officers discover is another lie, as the defendant had been looking through the man's daughter's bedroom window at 11:30 at night.

The following day, November 9th, Detectives Ojeda and Zatrepalek questioned the defendant for the first time.

Detective Ojeda testified that the defendant began the interview by complaining about how the police had been harassing him, constantly stopping him while walking through residential areas at night and asking him what he was doing. The defendant initially denied any knowledge of a blue ten-speed bicycle. The Detectives told him about the discovery of the bike at his residence, and the statements of his mother and brother that the defendant showed up with the bike the morning of the murder. The defendant still denied stealing the bike. Only when the Detectives turned up the heat, by revealing the defendant's brother's statements about the rhinestone watch the defendant had that morning, did the defendant finally admit stealing the bike because he got tired on his long walk home from the convenience store. The defendant denied showing his brother a watch, calling his brother a liar (T.T. 187-189, 192), (the defendant admitted stealing the rhinestone watch in his formal statement).

The Detectives then told the defendant that his brother had seen the defendant with bloodstained pants that morning, and the defendant denied having blood on his pants. Whey they told him his mother had also seen the blood, the defendant had a sudden brain surge and remembers "Oh, that right. I had gotten into a fist fight at the U'Totem, and that's how I got blood on my pants." (T.T. 190). The above dialogue reveals a pattern that began with the arresting officers: the defendant's first reaction is to lie, and to hang onto the lie until it is no longer feasible, and then to replace it with another lie.

Detective Ojeda continued to confront the defendant and the defendant continued to protest his innocence, insisting that they take his fingerprints because there was no way his prints were in the house. The defendant repeatedly accused Ojeda of harassing him and trying to frame him for the murder. (T.T. 192), which brings out another pattern: it is never the defendant's fault, but rather the police's fault, or his brother's fault, or his mother's fault. Detective Ojeda finally asked the defendant how he knew his prints would not be found, and the defendant replied it was because he was wearing socks. (T.T.195). The defendant certainly had a heightened appreciation for the importance of fingerprints, as will be demonstrated again shortly. The defendant refused to tell Detective Ojeda what he did with the socks, and there was no further information elicited from the defendant on the 9th. After being fingerprinted, the defendant told Ojeda how, while in California, the police had continually harassed him by stopping him for no reason as he walked through residential areas, and that one officer had broken down the door and shot him as he was attempting to "subdue" a female occupant. As the sentencing order shows, he was shot because he charged at the officer. Again, it's never the defendant's fault. Just ask him.

The next relevant date is November 14th, five days after his initial interrogation by Zatrepalek and Ojeda. On this date

David finger, an Assistant Public Defender assigned to the defendant's case, arrives at the jail to interview the defendant and another inmate. As they are brought together to meet Finger, a golden moment arrives. The defendant learns that the other inmate has given a confession. The defendant jumps all over him, stating, "Oh, you confessed to the police. They beat me and I didn't confess," and "They beat me and they didn't get a confession out of me. (T.T.298). Here, tucked neatly in the belly of a macho boast, is the embryo from which the defendant's Brady claim would later emerge.

Hearing this, Finger attempts to learn the specifics of the "the beating." But alas, there are none. The defendant can't name or even describe his assailants, nor give a single detail. Finger, having encountered this exact phenomenon countless times in the past, never gives it another thought. (T.T. 299).

Defense witness Robert Shultz, the defendant's counsel at the jail, was the one person at the jail who the defendant could confide in, who was there to be on the defendant's side, and whose job it is to report police misconduct. The defendant never mentioned the beating to Shultz, nor asked him to deliver a message to his attorney. Schultz never saw any signs the defendant had been beaten or was in any physical distress, and Shultz did not witness any mistreatment of the defendant by the Detectives who picked him up. (T.T. 274-281).

Detective Nagel, the Hallandale homicide detective, was a crucial witness in several respects. After obtaining the defendant's fingerprints from Detective Ojeda and matching them to prints found at the scene of a 1974 Hallandale burglary/murder, he contacted Detective Zatrepalek and informed him, on the morning of the 21st, of the print results, and that he wanted to question the defendant. This corroborates Detective Zatrepalek's testimony that he had no plans to interview the defendant that day, and was acting at the behest of Detective Nagel. Detective Zatrepalek had no plans to interview the defendant because he had nothing new with which to confront the defendant, at least not until talking with Detective Nagel and learning of the Hallandale print match. It was this fingerprint evidence, and not a right cross or left hook, with which Detective Zatrepalek clobbered the defendant on the 21st.

Detective Nagel corroborated other key aspects of Zatrepalek's testimony. Nagel testified that after the defendant's mother left, Zatrepalek told him that the defendant was willing to talk to both of them, and that when told of the print match, the defendant had said, "If they got my prints, I must have done it." (TT.118). This is exactly what the defendant told Nagel later that day (T.T. 120), after Nagel told the defendant they had him on prints. Nagel also noted that at this initial late afternoon introduction to the defendant, the

defendant had been calm and cooperative and in no visible distress. The following day, as Nagel and his partner entered the room where the defendant was seated, the defendant immediately stated "I will tell you everything. I did yours (pointing to Zatrepalek) and I did yours (pointing to Nagel's case file)" (T.T.121). The defendant was friendly and cooperative throughout.

Detective Zatrepalek testified that when the defendant was brought over, he told the defendant that some Hallandale Detectives wished to question him, and the defendant replied that he wanted to talk to his mother first. Zatrepalek dispatched officers to pick up the mother, Mary Gibson, and in the interim served the defendant lunch. When she arrived, he took her to the defendant, and at their request left them alone together. As Ms. Gibson was leaving, she told him that the defendant wanted to talk to the Detectives. (T.T. 232). This key aspect of his testimony is corroborated by Ms. Gibson, who stated that the defendant told her that after she left, he wanted to talk with the Detectives. (T.T. 151).

After Ms. Gibson left, Zatrepalek asked the defendant what he wanted to talk about, and the defendant said "the murder," and when asked which one, the defendant replied "the one we were talking about before." (T.T. 233). After describing the murder, the defendant agreed to give a formal statement. At the

conclusion of the formal statement, the defendant indicated he would rather talk with the Hallandale Detectives the next day, November 22nd. As he brought Detective Nagel in to see the defendant on the 22nd, the defendant pointed at Zatrepalek and said "I did his," then pointed at Nagel's case file and said, "I also did yours." (T.T. 247). This is corroborated by Detective Nagel, as set forth above. Zatrepalek had no plans to question the defendant on the 21st, and had arranged for the defendant to be brought over for the benefit of Detective Nagel. (T.T. 263). This is also corroborated by Nagel.

Mary Gibson, the defendant's mother, testified that when she was brought to the defendant on the 21st, he was initially cheerful and smiling, and said he was okay. The defendant appeared normal, and did not mention any beatings or threats or that he wanted his attorney. The defendant stated that he was in a lot of trouble, and they both became very emotional. (T.T. 136, 137). When she attempted to question the defendant about the nature of the trouble, the defendant said he did not want to "put no more pressure on you," and was very remorseful about how all this was affecting her. Ms. Gibson stated the Detectives were always very polite, and appeared to be treating the defendant well. At the conclusion of their meeting, the defendant said he wanted to talk to the Detectives. (T.T.148-151).

The final witness at the suppression hearing was the defendant. He claimed that on November 9th, Officer Charlie (Zatrepalek) and the "big heavy stout guy" (Ojeda) both beat him in the stomach and chest in an attempt to get him to confess, but he refused to give a statement. (T.T. 308). On the 14th, when visited by his attorney, the defendant was not asked to provide any specifics of the beating (which is directly contradicted by his attorney, David finger, who testified he attempted to get the details, but that the defendant was totally unable to provide any, see above).

The defendant testified both Officer Charlie and the same "heavy stout guy" came to the jail on the 21st (Detective Ojeda was in fact on injury leave at the time, (TT.945), and Detective Zatrepalek testified he sent two other homicide officers to pick up the defendant at the jail). Once at the homicide office, the defendant claims he immediately asked for his attorney after being threatened with another beating if he didn't confess. According to the defendant, the Detectives told him the Public Defender's Office was trying to make a name for themselves by handling his case, and that if he confessed he would go to a hospital, but that he would get the chair "If I took the P.D.'s office." (T.T. 312, 313). At least when the defendant makes up a story, he doesn't let implausibility stand in the way.

The defendant then stated that he asked to speak to his mother in order to tell her of the beatings and threats, and to have her contact his attorney. However, once she arrived he decided that she was on the Detectives side, because Officer Charlie "got in pretty good with my mother." (T.T. 314), therefore he didn't tell her of the threats and beatings. This is the same Mary Gibson who testified that she did not knowingly and voluntarily consent to the Detectives search of her home. (T.T. 141). After his mother left the Detectives (the defendant keeps speaking of "they" and "the detectives," (T.T. 312-315), in apparent reference to Detective Ojeda, who was not present) again threatened another beating, so he finally confessed.

On cross-examination, the defendant attempts to explain why he suddenly decided that his mother was in cahoots with Officer Charlie. (T.330, 331). Here lies a perfect example of someone caught in a lie, who attempts to solve his dilemma by throwing in another lie, with the final result being a steaming bowl of rotten mush. According to the defendant, what made him suspicious was that Officer Charlie left him and his mother alone together: "Why was I left alone? This is what I asked myself. Why was I left alone with my mother? So I could tell her? No way. I wouldn't even talk to you then?" Forgetting for the moment that Zatrepalek left them alone at their request (T.T. 232), the defendant's explanation is absolute foolishness. The defendant also states "I didn't even talk to her." (T.T. 330),

referring to his mother, which is trash of a similar stench (see Ms. Gibson's testimony above).

The defendant denied requesting that Officer Charlie be present during his confession to Detective Nagel on the 22nd, or rather he stated "No sir. Not to my knowledge." (T.T. 332). The defendant then stated that the reason he cried in his mother's presence was because his chest still hurt from the prior beating. (T.T. 332). OUCH!! The defendant denied telling his mother that he wanted to talk to the Detectives. (T.T. 333).

The defendant had a rough time admitting to his four California felony convictions. (T.T. 317, 318, 338). He at first insisted he had only one felony conviction. (T.T. 317, 318), then denied having any because "I did not do any time on those four convictions" (T.T. 338), which is an interesting statement since he subsequently stated that he went <u>to prison</u> in California under the name McArthur Jenkins. (T.T. 341). The defendant apparently needs only three pages of transcript to forget his most recent lie, a common ailment among those with a serious aversion to the truth.

The defendant then denied that, on November 25th, 1978, he insisted on giving a statement to Officer Charlie in an unrelated rape case, rather than the sexual battery Detective assigned to the case. Actually, the defendant stated, "I don't remember

that," and "No, I don't remember that, your honor." (T.T. 339, 340).

In rebuttal, Detective Zatrepalek reiterated that he never beat, threatened or coerced the defendant, and that on the 22nd, the defendant insisted he be present during his confession to Detective Nagel, and that on the 25th, the defendant insisted on giving a statement in an unrelated rape case to Zatrepalek rather than the Detective assigned to the case. (T.T. 348-352).

Conclusion on Materiality

The evidence of the bad acts of Detectives Ojeda and Zatrepalek, and the internal review investigation of Ojeda, were totally unrelated to this case and hence inadmissible. Even had the evidence been presented, there is no reasonable probability and indeed not the slightest possibility that the result below would have been affected. The defendant's allegation of threats and physical abuse was a farce from square one, and the defendant's Brady claim constitutes nothing more than a monumental effort to erect a mountain out of a gaping hole in the ground, and should be treated as such by this Court.

Suppression

In order for the evidence to be suppressed, it must be in the possession of the State. In Delap v. State, 505 So.2d 1323

(Fla. 1987), this Court held that evidence of an investigator's unrelated criminal activities, known only to the investigator, was not chargeable to the State within the framework of Brady. The State submits that Delap v. State controls the instant cause, and takes strong exception to the defendant's suggestion that Delap constituted a departure from established Brady principles. While it is true that police officers are a part of the prosecution team, and that the officers' possession of exculpatory evidence is chargeable to the state, this principle applies to evidence that is directly related to the defendant's case. Thus in Arango v. State, 467 So.2d 692, vacated and remanded, 474 U.S. 806 (1985), adhered to on remand, 497 So.2d 1161 (Fla. 1986), the lead investigator found a gun below Arango's apartment, but failed to disclose the discovery even though it arguably supported the defendant's theory of defense. In Smith v. Florida, 410 F.2d 1349 (5th Cir. 1969), the police officers failed to disclose an inducement to the State's star witness. In Schneider v. Estelle, 552 F.2d 593 (5th Cir. 1977), the undercover officer failed to disclose prior inconsistent statements he had given, and that he had admitted framing the defendant to cover-up his own ineptitude. In Freeman v. Georgia, 599 F.2d 65 (5th Cir. 1979), the police officer hid a material witness to the defendant's crime.

In all the cases relied on by the defendant, the evidence the officers failed to divuldge was evidence bearing directly on

the defendant's guilt or innocence, and had been obtained by the officers in the course of their investigation of the defendant. In the instant case the officer's knowledge of their cocaine use and other crimes did not flow from or have any connection with this case. Under the defendant's theory, the state would have to hire cameramen to follow each police officer around twenty-four hours a day to record any drug use or other illegal activity. It may be true that the dictates of Brady apply to impeachment evidence, however the concept of impeachment is not, as the defendant seems to believe, an unlimited one. The defendant would have this Court extend the duty to disclose impeachment evidence to include evidence whose only relevance is to demonstrate bad character. The State submits that to adopt such a position would constitute a radical departure from both established Brady principles, and good common sense.

The defendant also argues that the prosecutor, Lance Steltzer, had actual knowledge of Ojeda's cocaine use because he testified, at Ojeda's federal trial, that he has a vague mental image of Ojeda putting white powder to his nose at a party. The State respectfully submits that a prosecutor has no duty to disclose vague recollections (or even vivid recollections) of drug use by officers to anyone other than the officers' superiors, unless it relates directly to some facet of a pending case.

Finally, the defendant argues that other law enforcement agencies knew about the Detectives' criminal activities. The defendant relies on the internal review investigation of allegations by an informant, Eduardo Lavin, that Ojeda received drugs and gifts from Mario Escandar. As the defendant notes in his brief, this investigation was suspended because the informant's allegations could not be substantiated. The State maintains that it has no duty to disclose mere allegations of criminal activity of police officers, at least where the suspected criminal activity is totally unrelated to the case at hand. What the defendant is in effect asserting is that the State has an obligation to provide the defendant with any information, even bare allegations, reflecting on the character of its police witnesses. That is certainly not nor will it ever be the law.

Lastly, as to the twenty-two (22) internal security files, the defendant's position is that if he can identify confidential documents that he feels might contain beneficial information, he is entitled to an evidentiary hearing. The State contends that the trial court properly handled the defendant's fishing expedition by reviewing the documents (subject to a further review by this Court) and finding that they offered no support for the defendant's Brady claim.

CONCLUSION

The defendant's Brady claim is devoid of merit, and the trial court's order denying his 3.850 motion should thus be affirmed.

Respectfully submitted,

ROBERT A. BUTTERWORTH
Attorney General

RALPH BARREIRA
Florida Bar No. **0374490**
Assistant Attorney General
Department of Legal Affairs
401 N. W. 2nd Avenue, Suite N921
Miami, Florida 33128
(305) 377-5441

CERTIFICATE OF SERVICE

I **HEREBY CERTIFY** that a true and correct copy of the foregoing **BRIEF OF APPELLEE** was furnished by mail to **ELLIOT SCHERKER**, Assistant Public Defender, 1351 N. W. 12th Street, Miami, Florida 33125 on this 2 day of August, 1990.

RALPH BARREIRA
Assistant Attorney General

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