IN THE SUPREME COURT OF FLORIDA

CASE NO. 75,599

McARTHUR BREEDLOVE,

Appellant,

vs.

THE STATE OF FLORIDA,

Appellee.

APPEAL FROM THE CIRCUIT COURT OF THE
ELEVENTH JUDICIAL CIRCUIT OF FLORIDA
IN AND FOR DADE COUNTY

REPLY BRIEF OF APPELLANT

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ARGUMENT

THE TRIAL COURT ERRED IN SUMMARILY DENYING DEFENDANT'S MOTION FOR POST-CONVICTION RELIEF, WHICH MOTION SET FORTH A *PRIMA FACIE* CLAIM OF SUPPRESSION OF FAVORABLE IMPEACHMENT EVIDENCE BY STATE AGENTS, IN VIOLATION OF THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES AND ARTICLE I, SECTION 9, OF THE CONSTITUTION OF THE STATE OF FLORIDA.

On this appeal, the state appears to agree that the suppressed impeachment evidence set forth in the federal trial transcripts submitted in support of defendant's motion is true. Brief of Appellee at, *e.g.*, 31 ("the defendant must demonstrate that had the trial court or jury learned of the [detectives'] cocaine use and other criminal activity," the result of the proceeding would have been different). The state has chosen to rest its defense of the trial court's summary denial of defendant's motion primarily on its

belief that the suppressed evidence was not "material" under *United States v. Bagley*, 473 U.S. 667 (1985), although also contesting whether the evidence was suppressed within the meaning of *Brady v. Maryland*, 373 U.S. 83 (1963). Brief of Appellee at 29-30, 49-52.

On the question of suppression, the state does not dispute the legal framework of defendant's argument, *i.e.*, that the prosecution is constructively charged with matters known to its law enforcement agents or that -- at least as a general proposition -- a police officer's knowledge is not removed from the constructive awareness of the prosecution because that knowledge involves the officer's own criminality. Brief of Appellee at 49-50. The only argument offered by the state is that "this principle applies to evidence that is *directly related* to the defendant's case," and that the prosecution's "duty to disclose impeachment evidence" does not "include evidence whose only relevance is to demonstrate bad character" or criminal activities of the police which are "totally unrelated to the case at hand." Brief of Appellee at 51-52 (original emphasis).[1] It thus appears that the state's position on whether the withheld evidence was "suppressed" under *Brady* is linked inextricably to its position on the "materiality" prong of *Brady* and *Bagley*, that is, to its argument that the evidence of the detectives' criminal activities was irrelevant and inadmissible, Brief of Appellee at 36-38, and that the state otherwise has no defense to offer on

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[1] No authority is cited for this proposition; to the extent that the state relies on this Court's decision in *Delap v. State*, 505 So.2d 1323 (Fla. 1987), that decision is addressed at pp.36-42 of defendant's initial brief.

this aspect of the trial court's order.[2]

Stated otherwise, the state's position on this appeal seems to be that, while the undisclosed evidence was suppressed *in fact* by those who knew of it (the detectives themselves, other officers, and the trial prosecutor), the evidence was not "suppressed" under *Brady* because it was irrelevant. There are serious doctrinal problems with the state's admixture of the two separate *Brady* prongs, *Lindsey v. King*, 769 F.2d 1034, 1040 (5th Cir. 1985)(prosecutor may not fail to disclose impeachment evidence believed by the state to be "unreliable"; such a rule would "set[] *Brady* at nought"); however, the practical effect of its position before this Court is

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[2] Thus, the state offers no defense of the trial court's ruling that the detectives' Fifth Amendment privilege rendered their knowledge of their own criminal activities unchargeable to the state in this case. See Brief of Appellant at 34-42. Nor does it defend the propriety of the trial court's express reliance upon internal-review files -- which it refused to disclose to defendant's counsel -- to find that defendant had failed to prove his claim that the evidence was suppressed. See *id.* at 48-53. In his initial brief, defendant sought a remand for an evidentiary hearing on the question of constructive knowledge on the part of the state, asserting serious errors in the trial court's resolution of the factual issue presented in this regard. Brief of Appellant at 42-52. The remaining issues, *i.e.*, whether the detectives' knowledge of their own criminality satisfied the suppression prong of the *Brady* standard, and whether the suppressed evidence was sufficiently material to warrant relief, were set forth in the initial brief as questions of law or mixed questions of law and fact, open for plenary review before this Court based upon facts which appear of record without dispute, with the exception of one factual issue pertinent to the materiality question as to which the trial court's findings were made on an incomplete record. See Brief of Appellant at 58-59. The state has not disagreed, and except for the inappropriate credibility argument addressed at pp.9-11, *infra*, has not raised any arguments which are subject to resolution as factual issues. Accordingly, an evidentiary hearing is required in this cause on the question of suppression only if this Court deems necessary further factual development on the question whether knowledge on the part of state agents (other than the detectives themselves) proved suppression under *Brady*, an issue which need be reached only should this Court determine that the detectives' knowledge is not chargeable to the state.

to narrow the case to a single dispositive question: whether the suppressed evidence is sufficiently material to warrant relief under *Bagley*. On this question, the state offers two arguments: (1) that the trial court correctly found the undisclosed evidence to be inadmissible, and (2) that the evidence adduced at the pretrial suppression hearing in this case so conclusively disproved defendant's claim of physical abuse by the detectives during his interrogation that, "[e]ven had the [undisclosed] evidence been presented, there is . . . not the slightest possibility that the result below would have been affected." Brief of Appellee at 32, 36-38, 49.[3]

In support of its first argument, the state relies initially upon the Eleventh Circuit decision in *Delap v. Dugger*, 890 F.2d 285 (11th Cir. 1989), see Brief of Appellee at 32-36, which decision is fully addressed at pp.57-58 of defendant's initial brief. The state next contends that the suppressed evidence "fell squarely within the confines" of Section 90.404(1), Florida Statutes (1989) (bad-character evidence generally inadmissible) because the detec-

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[3] The state concedes, Brief of Appellee at 32, that the trial court erred in focusing its attention exclusively upon the trial of the case and in relying upon allegedly-persuasive corroborative evidence, including the hearsay statements of the defendant's mother and brother. See Brief of Appellant at 63-64, 69. While the state is entitled under Florida law to defend the trial court's ruling on any ground upon which it may be sustained, *e.g.*, *Rita v. State*, 470 So.2d 80, 83 (Fla. 1st DCA), *review denied*, 480 So.2d 1296 (Fla. 1985), it is noteworthy that the trial court in the post-conviction proceeding did *not* find that, as the Attorney General now argues, defendant's testimony at the pretrial suppression hearing was "incredible." Brief of Appellee at 32. Rather, the court noted that defendant had "claimed during a pretrial hearing on a motion to suppress that he was beaten" by the detectives, did not pass upon the facial veracity of that testimony, and deemed "[m]ore significant" the "other evidence" in the case -- evidence upon which the state expressly has declined to rely in this proceeding and as to which it has conceded that the trial court's analysis is legally incorrect.

tives had not been convicted at the time of defendant's trial. Brief of Appellee at 37. The state does not dispute or in any way seek to discredit the arguments set forth at pp.55-57 of defendant's initial brief, in which the governing law on the admissibility of a witness' prior bad acts when such are relevant to bias is discussed. Rather, the state's position seems to be that *all* of the suppressed evidence, including the indications that the detectives were under internal-review and other investigations at the time of defendant's trial, was inadmissible because the pending investigations of the detectives were "one hundred percent unrelated" to defendant's prosecution. Brief of Appellee at 37.[4] The trial court did not find the testimony inadmissible on this basis (R2 3564),[5] and the state's position is based upon a mistaken view of the controlling legal principles.

For the rule is that "[a] *defense witness'* supposed bias attributable to charges concerning a totally distinct offense, is not

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[4] The trial court, in denying relief, found that defendant had "failed to support his contention either that there was an ongoing investigation or that the detectives were aware of such at the time they testified at trial." (R2 3564). Defendant's challenge to this ruling, particularly on the ground that it placed the burden of proof on defendant while simultaneously denying him an opportunity to meet that burden since the motion was denied summarily, is set forth in his initial brief. Brief of Appellant at 59. The state not only offers no defense of the trial court's ruling in this regard, it seems to have accepted as a matter of fact that there *was* a pending investigation at the time of defendant's trial. Brief of Appellee at 37.

[5] Rather, the court recognized that "if Ojeda and Zatrepalek were aware that they were the subjects of an investigation, such evidence may have been admissible for showing a motive or bias for the witness's testimony" (R2 3564), which, as will be discussed *infra*, is a correct view of the governing legal principles. The trial court's error in this aspect of the case was, as previously noted, in its factual findings and allocation of the burden of proof in a summary proceeding. See n.4, *supra*. The state, however, has chosen a different approach -- and one which is manifestly erroneous.

a proper subject for impeachment," but that, "[w]hen a *prosecution* witness is under criminal charges at the time he testifies, the defense is entitled to bring this fact out." *Fulton v. State,* 335 So.2d 289, 283-84 (Fla. 1976)(emphasis supplied). This is so for the well-recognized reason that "[t]estimony given in a criminal case by a witness who himself is under actual or threatened criminal investigation or charges may be biased in favor of the [s]tate . . . because the witness may seek to curry [prosecution] favor with respect to his own legal difficulties." *Morrell v. State,* 297 So.2d 579, 580 (Fla. 1st DCA 1974). Thus, the state's contention that pending or threatened charges must be directly related to the case on trial to be relevant as impeachment of *prosecution* witnesses is utterly wrong:

> Pending or recent charges of unrelated offenses against a *defense* witness are not proper grounds for impeachment; however, if a witness for the *state* is "under actual or threatened criminal charges or investigation leading to such criminal charges, a person against whom such person testifies in a criminal case *has an absolute right* to bring those circumstances out on cross-examination or otherwise.

Hernandez v. Ptomey, 549 So.2d 757, 758 (Fla. 3d DCA 1989)(citations omitted; emphasis by the court); *accord, e.g., Patterson v. State,* 501 So.2d 691, 692 (Fla. 2d DCA 1987)(pending unrelated criminal charges against state witness; defendant "has an absolute right to bring those charges out in cross-examination, *even when they relate to a different offense*")(citations omitted; emphasis supplied); *Watts v. State,* 450 So.2d 265, 267-68 (Fla. 2d DCA 1984)(state witness' probationary status erroneously barred from exploration as impeachment); *Garey v. State,* 432 So.2d 796, 797 (Fla. 4th DCA 1983)("other pending criminal charges" admissible on cross-ex-

amination "to demonstrate the witness' bias or motive")(citations omitted); *Moreno v. State*, 418 So.2d 1223, 1226 (Fla. 3d DCA 1982) (immunity grant in unrelated prosecution proper subject for cross-examination); *Mendez v. State*, 412 So.2d 965, 966 (Fla. 2d DCA 1982)(police officer's unrelated prior suspensions for use of excessive force improperly excluded on cross-examination where relevant to establish motive for giving false version of pertinent events at trial); *Sarmiento v. State*, 371 So.2d 1047, 1052 (Fla. 3d DCA 1979)("recent criminal investigation" of detective, unrelated to case on trial, was proper subject of impeachment inquiry), *approved*, 397 So.2d 643 (Fla. 1981); *Cowheard v. State*, 365 So.2d 191, 192-93 (Fla. 3d DCA 1978)(witness' pre-sentence posture in unrelated federal prosecution relevant "to demonstrate the witness' bias or motive" even absent a "showing of threats or promises made by the state in connection with the federal case"), *cert. denied*, 374 So.2d 101 (Fla. 1979); *Crespo v. State*, 344 So.2d 598, 600 (Fla. 3d DCA 1977)(unrelated criminal charge pending against state witness relevant to show bias or motive); *Lee v. State*, 318 So.2d 431, 432-33 (Fla. 4th DCA 1976)(unrelated robbery charge admissible to impeach informant despite prosecution's denial of arrangements with witness).[6]

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[6] In support of its argument that "there was no constitutional imperative requiring the admission of this evidence," the state relies upon *Delaware v. Van Arsdall*, 475 U.S. 673 (1986), and the decisions in *Francis v. State*, 473 So.2d 672 (Fla. 1985), *cert. denied*, 474 U.S. 1094 (1986), and *Francis v. Dugger*, 908 F.2d 696 (11th Cir. 1990), the latter two of which involve the same defendant and trial. These cases do not address the *admissibility* of *any* particular type of impeachment testimony, much less testimony which is similar to the suppressed evidence in this case. *Van Arsdall*, in the portion of that decision upon which the state relies, simply endorses the basic notion that "trial judges retain wide latitude . . . to impose reasonable limits on cross-examina-
(Cont'd)

This fundamental proposition is fully applicable to the suppressed impeachment evidence in this case. A police officer who is "under internal review investigation for actions in other cases" is properly subjected to cross-examination on the pending investigation, with the defendant having "an absolute right to bring theses facts to the jury's attention in order to show bias, motive or self-interest." *Hernandez v. Ptomey,* 549 So.2d at 758 (citation omitted). Similarly, the detectives' participation in criminal activity, to the extent that such was known to agents of the state, was also admissible as impeachment. *Greene v. Wainwright,* 634 F.2d 272, 274-76 (5th Cir. 1981)(defendant wrongly prohibited from ques-

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tion 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." *Delaware v. Van Arsdall,* 475 U.S. at 673. In *Francis v. State,* this Court held that there had been no error in sustaining an objection to a question of a prosecution witness regarding a pending criminal charge arising from the death of her husband because the defendant had failed to demonstrate the relevance of the cross-examination:

> Francis . . .argues that the trial court erred in prohibiting him from cross-examining Deborah Wesley Evans concerning criminal charges which were pending against her. . . . .
>
> The State . . . argues that the trial court did not abuse its discretion . . . and that the Evidence Code prohibits introduction of an unrelated crime absent a showing of relevance. Francis did not proffer what answer Deborah would give or how her answer would be relevant to prove a material fact other than her bad character or propensity toward violence. Upon review of the record, we hold that the trial court did not abuse its discretion to control the scope and manner of the cross-examination.

473 So.2d at 673-74. The Eleventh Circuit's decision in *Francis v. Dugger* approved this holding, and further held that any error was harmless in light of the otherwise-extensive cross-examination of the witness, the corroboration of her testimony by other witnesses, and the overwhelming evidence of Francis' guilt. 908 F.2d at 701-03.

tioning police officer "about certain bizarre criminal actions in which [the officer] had been involved"; evidence could have provided basis for "argu[ing] that [the officer] was testifying to avoid prosecution for other illegal activities," even without evidence of a "deal" with the state).[7] The state simply cannot defeat the clear admissibility of the suppressed evidence.

The state's second contention is support of its argument that the suppressed evidence was not material is that "even had the bad character evidence been admitted as impeachment, there is no reasonable probability that the outcome would have been different" -- but not because the suppressed evidence would not have affected the factfinder's view of the detectives' credibility. Instead, liberally larding his brief with invective and perjorative characterizations[8] which befit neither his position as the "chief state legal officer," Art. IV, § 4(c), Fla.Const., nor the gravity of this proceeding, the Attorney General contends in essence that the

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[7] In its brief, the state utterly fails to address defendant's independent argument that the evidence of the detectives' cocaine-abuse habits was admissible as an entirely separate matter, *i.e.*, to corroborate defendant's claim that they had behaved violently during the interrogation, regardless of any other basis for its introduction. Brief of Appellant at 59-61. And, as the court noted in *Greene*, a witness' "mental instability" at "'a time about which he proposes to testify'" is highly relevant. *Greene v. Wainwright*, 634 F.2d at 276 (citation omitted).

[8] *E.g.*, "the suppression hearing transcript literally screams *LIAR!!*" at defendant's testimony, which was a "big fat lie" and "thoroughly bogus testimony," Brief of Appellee at 29-30; "defendant's allegation of a beating and threats was pure unadulterated hogwash," *id.* at 32; "it is never the defendant's fault, but rather the police's fault; or his brother's fault, or his mother's fault," *id.* at 41; "when the defendant makes up a story, he doesn't let implausibility stand in the way," *id.* at 46; defendant's testimony is "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," *id.* at 47.

testimony at the pretrial suppression hearing so conclusively established that defendant was lying when he testified to physical abuse at the hands of Ojeda and Zatrepalek that evidence pertinent to their credibility could not possibly have affected the court's ruling on the motion to suppress. Brief of Appellee at 39-49.[9]

Before addressing the specific factual matters urged by the state, it is critical to place its position in the proper context, *i.e.*, this is an appeal from a *summary denial* of defendant's post-conviction motion, on which his allegations must be taken "at face value," *Lightbourne v. Dugger*, 549 So.2d 1364, 1365 (Fla. 1989), *cert. denied*, ___ U.S. ___, 110 S.Ct. 1505 (1990), and "treat[ed] . . . as true except to the extent that they are *conclusively* rebutted by the record." *Harich v. State*, 484 So.2d 1239, 1241 (Fla.)(emphasis supplied), *cert. denied*, 476 U.S. 1178 (1986). Accordingly, the trial court -- quite properly, in this instance --

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[9] As is set forth in appellant's initial brief, the trial court gave *no* weight to the potential effect of the suppressed evidence on the outcome of the suppression hearing, focusing exclusively upon the trial-in-chief, and erroneously so. Brief of Appellant at 63-65. The Attorney General, on the other hand, chooses to ignore the difference that the evidence could have made at trial and he focuses exclusively on the suppression hearing. Of course, the proper analytical framework, under the strictures of *United States v. Bagley*, 473 U.S. 667 (1985), is to assume that the suppressed evidence would have been "disclosed and used effectively," *id.* at 676, and to then evaluate "the strength or fragility of the state's case *as a whole*," *Stano v. Dugger*, 901 F.2d 898, 903 (11th Cir. 1990(citation omitted; emphasis supplied), in light of the *entire* record. *United States v. Bagley*, 473 U.S. at 682-84. Neither the trial court in the proceedings below nor the state on this appeal is willing to evaluate the case under this standard; each has selected one or another portion of the trial proceedings and narrowed its analysis accordingly. Defendant's position on the potential impact of the suppressed evidence on the trial-in-chief, and his contentions with regard to the post-conviction court's legal errors in that regard, are fully set forth in his initial brief at pp.65-70. Since the state has chosen not to answer those arguments, the focus in this brief will be upon the position that the state has taken on appeal.

did *not* undertake to pass upon the credibility of defendant's pretrial testimony that his confession had been coerced by physical brutality (T1 309, 321-33; R2 3564). *E.g., Holland v. State,* 503 So.2d 1250, 1252 (Fla. 1987).[10] In the posture of the case on this appeal, the state is in no better position to do so.

Further, the state mistakenly gives no weight to the one critical fact which emerges from the record of the suppression hearing: the record shows that, whenever defendant had contact with persons other than the interrogating detectives, his version of the events is *corroborated*. The testimony of David Finger, the assistant public defender who interviewed defendant in between the two interrogation sessions, is noted by the state in its brief, with the state attempting to transform Finger's alleged disbelief of defendant's

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[10] Nor, for that matter, did the original trial judge who presided over the pretrial proceedings: in the course of detailed findings made at the conclusion the suppression hearing, the trial judge found that defendant's waiver of the privilege against self-incrimination had been voluntary, but never made *any* finding that defendant's claim of coercion was false (T1 391-95). Under Florida law, the trial court was obligated only to find that the state had established a valid waiver by a preponderance of the evidence, *e.g., DeConingh v. State,* 433 So.2d 501, 503 (Fla. 1983), *cert. denied,* 465 U.S. 1005 (1984), not that defendant necessarily was lying, in order properly to deny the suppression motion. *See, e.g., Boatwright v. State,* 452 So.2d 666, 669 (Fla. 4th DCA 1984)("the fact that two witnesses disagree does not necessarily establish that one is lying"). Indeed, the trial court could well have *believed* defendant's claim that he had been abused at the first interrogation session while disbelieving his testimony regarding threats of further beatings at the second session, determined that the violence did not have a causative effect on the ultimate admissions, and denied the motion on that basis. *See Leon v. State,* 410 So.2d 201, 203-04 (Fla. 3d DCA), *review denied,* 417 So.2d 329 (Fla. 1982). Thus, there simply is no warrant in the trial record for an argument that the trial judge found defendant to have been untruthful in his testimony at the suppression hearing. And this Court, on defendant's direct appeal, similarly made no such finding in passing upon his challenges to the admissibility of his post-arrest statements. *Breedlove v. State,* 413 So.2d 1, 5-6 (Fla.), *cert. denied,* 459 U.S. 882 (1982).

statement that he had been beaten into a significant factor. Brief of Appellee at 42. However, what is significant about Finger's testimony is that *before* the second interrogation session -- at which the confession was obtained -- defendant told the first person with whom he had contact after his arrest and who was not connected with law enforcement that he had been beaten by the police (T1 287). Whether or not Finger's apparent cynicism as to such claims (T1 299) caused him to disbelieve defendant is utterly irrelevant. *E.g., Boatwright v. State,* 452 So.2d 666, 668 (Fla. 4th DCA 1984)("it is an invasion of the jury's exclusive province for one witness to offer his personal view on the credibility of a fellow witness")(citation omitted); *Bowles v. State,* 381 So.2d 326, 32728 (Fla. 5th DCA 1980)(same). Similarly, defendant's claim that, on the day of the final interrogation session, he had told the officer who took him from the jail to the police station that he did not want to be questioned (T1 312), was corroborated by Robert Schultz, the correctional officer who overheard the exchange (T1 273-77, 300-02; R1 89-91).

The state cannot show that defendant's claim of coercion is "conclusively rebutted" by the record, but only that there was conflicting evidence at the suppression hearing -- from, notably, Ojeda and Zatrepalek, the *only* witnesses who contradicted defendant's claim of coercion.[11] That Ojeda and Zatrepalek gave contra-

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[11] The other witnesses whose testimony is recited by the state in its brief at pp.39 & 42-44 were not present at the interrogation sessions at issue; the state does not dispute that its only witnesses to the disputed events were the two detectives. Nor does the state point to any non-testimonial evidence, *e.g.*, physical evidence, police records, or photographs, which support its position, and there is none in the record: the suppression hearing simply was a credibility contest, and one in which defendant was (Cont'd)

dictory testimony is plainly shown on the record, and the state's argument before this Court is the one that it undoubtedly would have made following a hearing before the trial court on the admissibility of defendant's statements at which the suppressed impeachment testimony was presented for full consideration by the trier of fact. That the state's argument could have prevailed is not the standard upon which this case must be decided. *United States v. Bagley*, 473 U.S. at 682; *Delap v. Dugger*, 890 F.2d at 299.

Rather, the appropriate inquiry on *Brady* materiality in a case in which impeachment evidence is suppressed is plainly *not* whether the impeachable witness gave testimony which conflicted with that of the accused: if there had been *no* testimony that conflicted with defendant's claim of coercion, and his suppression motion nonetheless had been denied upon a finding that his uncontradicted testimony was insufficient to establish a case of an involuntary confession, there would obviously be no prejudice at all from the suppression of impeachment evidence. It is the fact that there *was* conflicting evidence that establishes the prejudice from the non-disclosure of the conflicting evidence; the state's attempt to fashion a claim of no prejudice from the testimony of Ojeda and Zatrepalek must of necessity fail. The state does not -- and indeed, cannot -- seriously suggest that the suppressed testimony would not have affected a reasonable factfinder's view of the detectives' credibility, and defendant accordingly has set forth a compelling *prima facie* claim for relief.

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unfairly deprived of weapons with which to challenge the testimony of the detectives.

CONCLUSION

Based on the foregoing, defendant requests this Court to reverse the order of the trial court and to remand for appropriate proceedings.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was forwarded by mail to RALPH BARREIRA, Assistant Attorney General, 401 N.W. Second Avenue, Suite N921, Miami, Florida 33125 this 26TH day of September, 1990.

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