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IN THE SUPREME COURT OF FLORIDA

CASE NO. 77,736

DOUGLAS ESCOBAR,

Appellant,

v.

THE STATE OF FLORIDA,

Appellee.

****

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

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REPLY BRIEF OF APPELLANT

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I. THE TRIAL COURT ERRED IN DENYING DEFENDANT'S MOTION TO SUPPRESS.

On April 30, 1998, heavy doses of morphine had been administered to Defendant ESCOBAR. (R. 1125-7). Detective Roberson testified that the Defendant did not appear to be under the influence of any medication, (R. 998) which demonstrates that his analysis of the Defendant's condition is flawed at best, and biased at worse.

The State argues that Detective Roberson's advice to the Defendant that (without mentioning the State's option to seek the death penalty) a likely sentence would be served in Florida, may not be raised as an issue on appeal because it was not raised at the trial court. (State's Answer Brief at p. 27). The State's argument is without merit. The Defendant elicited the Detective's testimony during an evidentiary hearing on Defendant's properly raised and preserved Motion to Suppress statements made by the Defendant to Detective Roberson. (R. 945).

No additional objection or argument is necessary to preserve consideration of the Detective's actions and representations to the Defendant as it relates to supporting suppression of the resulting statements. The State is suggesting that the Defendant should object to the same testimony he is bringing forth to support his Motion to Suppress!

The State goes on to ask this Court to accept and rely on the opinion of a treating nurse over the testimony of the treating physician and an expert witness who is a licensed physician. (State's Answer Brief at p. 22, note 1, and p. 24). The treating physician, Dr. Henry "indicated that on April 30th, Escobar's general medical condition was poor and he did not think the defendant would understand Miranda warnings." (R. 1127-8).

The Defendant's mind was obviously intoxicated and overcome by morphine. Any statement elicited from the Defendant in such a state should have been suppressed.

III. EVIDENCE OF THE CALIFORNIA SHOOT-OUT WAS NOT ADMISSIBLE AS EVIDENCE OF FLIGHT AND CONSCIOUSNESS OF GUILT, AND THIS EVIDENCE, TOGETHER WITH OTHER WILLIAMS RULE EVIDENCE, ERRONEOUSLY BECAME THE FEATURE OF THE TRIAL.

The State contends that evidence of the California incident involving a shoot-out with California troopers was properly admitted as evidence of flight from a threatened prosecution and as evidence of consciousness of guilt. This evidence, however, was not properly admitted where there was a significant time delay of more than one month between the charged offense and the California incident and where the defendants were unaware at the time of flight, and in fact were not the subject at the time of flight, of a criminal investigation for the particular time charged.

In support of its position the State relies on Bundy v. State, 471 So. 2d 9 (Fla. 1985). (Answer Brief, p. 38). As noted by this Court in Bundy, the probative value of flight evidence as circumstantial evidence of guilt has been analyzed by the Fifth Circuit Court of Appeals as depending upon the degree of confidence with which four inferences can be drawn: (1) from the defendant's behavior to flight; (2) from flight to consciousness of guilt; (3) from consciousness of guilt to consciousness of guilt to the crime charged; and (4) from consciousness of guilt concerning the crime charged to actual guilt of the crime charged. Id. at 20, citing United States v. Myers, 550 F.2d 1036, 1049 (5th Cir. 1977). As further noted in Bundy, these criteria have been applied by the Eleventh Circuit Court of

Appeals in United States v. Borders, 693 F.2d 1318, 1325 (11th Cir. 1982), cert. denied, 461 U.S. 905, 103 S.Ct. 1875, 76 L.Ed.2d 807 (1983), where the court explained that the probative value of flight evidence is weakened: (1) if the suspect was unaware at the time of the flight that he was the subject of a criminal investigation for the particular crime charged; (2) where there were not clear indications that the defendant had in fact fled; and (3) where there was a significant time delay from the commission of the crime to the time of flight. In Bundy, the defendant fled two days after the crime when a police officer spotted the license plate the defendant had been using on the floorboard of the car, and then again six days after the crime when again stopped by a police officer. In Bundy, the crime had attracted great publicity and there is a reasonable inference that the defendant knew, at least by the time of the second flight, that he was the subject of a criminal investigation for the particular crime charged. Also in Bundy, there was no significant time delay from the commission of the crime to the time of flight, two days after the crime and then again six days after the crime. Unlike in Bundy, in the case at bar the Defendant had no reason to believe that he was the subject of investigation for the crime charged, and in fact there were no leads or suspects in the case at that time, and the Florida crime was not highly publicized, if at all, in California. Further, in the case at bar more than a month had passed from the flight in California since the crime charged in Florida had been committed. If the knowledge of the outstanding warrants in California was sufficient to cause the flight in Florida a month earlier resulting in the shooting of Officer Estefan, then certainly

the knowledge of outstanding warrants in California was sufficient by itself to cause the flight in California a month later.

The State further argues that the Defendant's claim that the collateral offenses became a feature of the trial is not preserved for appeal. (Answer Brief, pp. 41-42). The State overlooks that in addition to the remarks and cautions by the trial judge that the collateral offenses could become the feature of the trial (See Initial Brief, p. 36), in the Defendant's request to re-open cross-examination, denied by the trial judge, the attorney for the Defendant specifically objected:

> Mr. Galantar: Quite frankly, there was a trial in California, what the verdict was and what they were convicted of, what their sentence would be and at that time the reason I am doing that is because after the graphic direct of Mr. Laeser, this jury is left with the impression, we are re-trying the California case, there hasn't been a punishment in California and I think they are entitled to know it's been adjudicated, decided and over with. (R. 4977).

The State cannot now contend that this claim that collateral offenses became featured in the trial has simply been manufactured by the Defendant for purposes of appeal, where both prior to trial and throughout he course of the trial the Defendant's concerns were apparent, the Defendant objected to all the evidence in question, the Defendant specifically stated his concern that the California case was being re-tried in the case at bar, and the trial judge made a number of remarks, even jokingly, about the Williams Rule evidence and cautioned the State on this matter. Clearly this issue is preserved for appeal.

The State further contends that the collateral offenses did not in fact become a feature of the trial in the case at bar and recites the

number of pages of testimony and the context of that testimony with respect to a number of witnesses. (Answer Brief, pp. 42-44). However, the number of pages of testimony and exhibits is not the sole test by any means, Townsend v. State, 420 So. 2d 615, 617 (Fla. 4th DCA 1982), and similar fact evidence will not be considered to be a feature of the case merely because a large amount of it comes before the jury, Snowden v. State, 537 So. 2d 1383, 1385 (Fla. 3d DCA 1989). The question that arises, if the evidence is admissible as relevant, is whether or not the State was permitted to go too far in introduction of testimony about he latter [collateral] crime so that the inquiry transcended the bounds of relevancy to the charge being tried, and made the later offense a feature instead of an incident. Williams v. State, 117 So. 2d 473, 475 (Fla. 1960).

In the instant case, the evidence of the California incident was sought to be introduced as relevant to establish the Defendant's consciousness of guilt and his involvement in the charged offense. The introduction of this evidence far surpassed the bounds of relevance as to the Defendant, DOUGLAS ESCOBAR. According to the California trooper, the facts surrounding the California incident were presented just as graphically and detailed as at the California trial (R. 4954-4955). This testimony was enhanced by photographs and sketches portraying the scene (R. 4901, 4902, 4917), a photograph of a weapon found during that incident (R. 4945), and a photograph of the injuries sustained by one of the troopers at the scene during the course of the California incident (R. 4975). The trial judge even remarked that it was the "bad character of the Defendant" that was demonstrated "with all the stuff that we have from California."

(R. 5458). Where the only similar characteristic shared between the charged offense and the California incident was that both incidents occurred during a routine traffic stop, where the only involvement by the Defendant in the charged offense as alleged by the State was his statement to the co-defendant, "shoot him if he gets out of the car" (or, alternatively, "shoot him" said when the Defendant saw the officer's gun pointed at the co-defendant), and where the State could have accomplished its goal of showing consciousness of guilt evidenced by flight without the unnecessary, irrelevant and detailed account of the California flight, then the only reason for the State to elicit the detailed and graphic evidence of DOUGLAS' involvement in the later California incident was to portray him as a dangerous and evil defendant with culpability for his greater role in the California incident to be confused with his lesser role in the instant consisting only of the excited utterance to the co-defendant, "shoot him." The State argues that the California incident is relevant as it "rebuts Douglas' attempts to minimize his own role" (Answer Brief, p. 40), but where the State has alleged only a statement by he Defendant in the charged case, as related only to the shooting, and then features in detail the expanded role of the Defendant in the separate incident, the State is clearly using this Williams Rule evidence and wrongdoing of the Defendant in the separate case to obtain a first-degree murder conviction in the charged offense. When the State not only featured the California incident to prejudice the Defendant, and other improper evidence of bad character was admitted [that the Defendant bragged about being known as the "Bandit of Camino Real" because of his chain of holdups (R. 4820) and that the

Defendant had previously put a pistol to a friend's chest and threatened to kill him (R. 5122)] the feature of the trial in the instant case was that the Defendant was an "evil" man (see the State's closing argument, R. 5843) deserving of punishment for his bad character rather than his role in the offense charged. The other evidence of guilt, even if sufficient to sustain a murder conviction, without the erroneously admitted Williams Rule evidence cannot be said to be sufficient beyond a reasonable doubt to sustain a recommendation of death.

With regard to the State's final argument on this issue that the prejudicial effect of this evidence did not outweigh the probative value (Answer Brief, p. 44), the trial court implicitly weighed the probative value and prejudicial effect in its initial decision to deny the admission of this Williams Rule evidence. When the trial court's decision to deny the admission of this evidence was reversed by the Third District Court of Appeal, State v. Escobar, 570 So. 2d 1343 (Fla. 3d DCA 1990), solely as to the relevancy of the evidence, the trial judge simply abdicated his earlier determination and stated, "I'm going to do exactly what the Third District told me to do, allow the evidence in, period (R. 4194). The trial court's initial instincts that this highly prejudicial Williams Rule evidence outweighed its probative value, absent an abuse of discretion, should be given great weight by this Court in addressing the admissibility of this evidence in the case at bar.

IV. PHOTOGRAPHS AND SKETCHES OF THE DEFENDANT'S COLLATERAL CRIMES WERE ERRONEOUSLY ADMITTED AND IMPROPERLY ENHANCED THE TREATMENT OF THESE CRIMES AS A FEATURE OF THE TRIAL.

The Defendant relies on its argument that Williams Rule evidence

erroneously became the feature of the trial below (Initial Brief, pp. 26-39; Reply Brief, pp. 4-10) that these photographs and sketches were erroneously admitted and the prejudicial effect substantially outweighed the probative value (Initial Brief, pp. 39-42). The Defendant's failed attempt to shoot at the trooper in the California incident (the collateral crime), the photograph of the unrelated semi-automatic pistol with a projectile jammed into it used in that incident (Exhibit 59, R. 4948-4949), and a photograph of the actual injuries sustained by a California trooper during that incident (Exhibit 60, R. 4974-4975), bore no relevance to consciousness of guilt or to the Defendant's involvement in the charged offense in the case at bar. This is particularly so where the State argues relevance of the collateral crimes to the Defendant's involvement in the case at bar and where the Defendant's involvement in the shooting in the case at bar, as alleged by the State at trial, was limited to a statement to the co-defendant to, "shoot him" [the victim]. The State's argument that photographs of the weapon "provided visual corroboration of the trooper's testimony that DOUGLAS had continually attempted to shoot the weapon" (Answer Brief, p. 46) corroborated only that DOUGLAS was a bad character, not any similar involvement by DOUGLAS in the shooting in the charged offense.

V. THE STATE IS INCORRECT THAT THE NON-APPROVED WILLIAMS RULE EVIDENCE WAS NOT OBJECTED TO BY THE DEFENDANT AND THAT ANY ERROR WAS HARMLESS.

In support of its position that the Defendant acquiesced in the testimony by witness Douglas Seballos that the Defendant was wanted for a "chain of holdups" and "bragged that he was known as the Bandit of El

Camino Real, and that was a scary thing," the State recites (Answer Brief, pp. 47-48) a colloquy between the prosecutor, the defense attorney for DOUGLAS ESCOBAR, and the trial judge, where in response to a motion in limine to specifically exclude any reference that DOUGLAS was a bad guy, a violent guy, or other characterizations of that type (R. 4809), the prosecutor stated:

> Mr. Band: . . . I cautioned this witness previous to this, and I have gone over his testimony before. The only area where he will comment is on a comment Douglas Escobar made to him that he was wanted in California for robberies, but other than that . . . we are staying away from the character (R. 4809).

When Seballos testified, however, he did not limit his comments to the fact that DOUGLAS knew of outstanding warrants in California or that he was wanted for robberies, but rather he made reference to the fact that DOUGLAS was a "bad, violent guy" by indicating that DOUGLAS "bragged" about being known as the Bandit of El Camino Real. (R. 4820).[1] The comments made by Seballos were clearly those agreed not to be elicited by the prosecutor, objected to by defense counsel for DOUGLAS, and used solely to prove bad character and propensity to commit the crime charged.

The State further claims that other irrelevant evidence of bad character (testimony by Ramon Arguello, a witness for the prosecution, elicited by the co-defendant on cross-examination, that DOUGLAS had on one occasion put a pistol to his chest and threatened to kill him, R. 5122) was

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[1]Not evident to this Court is that the "Bandit of El Camino Real" may have referred to the highly publicized string of violent robberies which had taken place in the Camino Real area of Dade County, Florida, an admission which would be much more inflammatory to the jury seated in Dade County than the admission to a series of robberies taking place in faraway California.

not properly objected to. (Answer Brief, pp. 48-49). The Defendant, prior to an affirmative answer from the witness, objected to the question and this objection was overruled. (R. 5122). After the affirmative response, the Defendant requested a mistrial and objected that this testimony was "totally improper, totally irrelevant to this case." (R. 5126). This testimony, both in context and on its face, was unmistakably evidence of an irrelevant collateral offense elicited for no other reason than to unnecessarily prejudice the Defendant. That defense counsel did not articulate the phrase "Williams Rule" has no bearing on the sufficiency of the objection where as a matter of law improper and irrelevant evidence of a collateral crime is inadmissible and the basis for this objection was clearly understood by the trial judge. The State concludes that any error was nevertheless harmless since evidence of other violent incidents, including the California shoot-out, had been admitted. (Answer Brief, p. 49). Where the only evidence of defendant's guilt is this purported non-recorded confession to a single Detective and evidence of numerous prior and subsequent collateral violent incidents are elicited to the jury, it cannot be said that the state has overcome the presumption that admission of impermissable violent collateral crimes evidence is harmful. Castro v. State, 547 So.2d 111 (Fla. 1989). The State cannot establish beyond a reasonable doubt that the prejudicial nature of the evidence did not affect the determination of guilt. State v. Lee, 531 So.2d 133 (Fla. 1988) and State v. DiGuilio, 491 So.2d 1129 (Fla. 1989). Even if there were ample evidence of guilt as to the murder in the instant case, as the State contends, it cannot be said beyond any reasonable doubt that this evidence,

without the erroneously admitted evidence of other crimes, was sufficient to sustain the recommendation of death.

VI. THE STATE MISAPPREHENDS THE PROHIBITION AGAINST EX PARTE COMMUNICATIONS.

The State relies on the findings of the Special Master that, in essence, since no witness could testify as to any recollection of the off-the-record discussion concerning the motion for rejoinder, and since discussion about this motion must have been during one of many routine informal proceedings to discuss administrative and scheduling matters at which attorneys for at least one of the defendants was present, the discussion concerning the motion for rejoinder could not have been an improper *ex parte* communication.

Both the State and the Special Master appear to assume that the prohibition against *ex parte* communications requires that the communication between the State and the trial judge be secretive with sinister intent. The State urges that any claim of improper *ex parte* communication must fail since the "judge and prosecutors emphatically denied the existence of any *ex parte* communication." (Answer Brief, p. 52). The Defendant has not and does not now claim that the prosecutor and the trial judge below surreptitiously forged a sinister scheme for rejoinder to the detriment of the defendants. The denial by the prosecutors and the trial judge of improper communications, based on the probable recollection that there was no secretive meeting and no sinister intent, does not, however, legitimize the communication that occurred in the case at bar.

The State claims that the Florida Supreme Court held in Ferguson v. Singletary, 632 So.2d 53 (Fla. 1994) that the absence of a correct record

does not deny due process of law and therefore the missing transcript of the Rejoinder discussion is not error. The State misreads Ferguson which simply held that ineffective assistance of counsel is not established by a defense attorney's decision not to transcribe portions of the record for which no error is asserted! Ferguson, at 58.

The State misapprehends or ignores the principles announced by this Court in Spencer v. State, 615 So. 2d 688 (Fla. 1993); Rose v. State, 601 So. 2d 1181 (Fla. 1992); and In re Dekle, 308 So. 2d 5 (Fla. 1975), that the important reason for the prohibition against *ex parte* communications is to protect the appearance of impartiality and integrity on the part of the trial judge and to protect against the opportunity for prejudice to a defendant. In the case at bar, there was clearly a discussion about the motion for rejoinder which had been "explained" to the judge by the prosecutor (R. 1333). According to the speculation by prosecutors and the trial judge at the evidentiary hearing, and implicit in the Special Master's findings, this discussion must have taken place at an informal meeting in chambers to discuss routine scheduling matters. The State characterizes this discussion as "a reference, after casual discussion, in chambers, about scheduling and transportation, to an intent to file an impending motion to re-consolidate." (Answer Brief, p. 53). The State ignores the uncontroverted testimony by the attorney for Dennis Escobar that he was not present at any such discussion about the motion for rejoinder (HT. 111). All of the witnesses acknowledged the frequent off-the-record proceedings at which the attorneys for one or both of the defendants were present. Assuming facts most favorable to the State, the

best-case explanation of the discussion concerning the motion for rejoinder is that it took place off-the-record during an informal proceeding outside the presence of the attorney for Dennis Escobar. While under the State's version of events this discussion was not secretive or sinister, the casual discussion of a critical issue off-the-record and outside the presence of at least the attorney for Dennis Escobar certainly erodes the appearance of impartiality and integrity on the part of the trial judge and creates the opportunity for prejudice to at least the excluded defendant. It is precisely the cavalier treatment of a very serious substantive issue, outside the presence of at least one defendant, that renders the trial judge below "guilty of obtuseness and raw ineptness which cannot be condoned or go uncondemned" as this Court described in In re Dekle, 308 So. 2d 5 (Fla. 1975). The discussion of the motion for rejoinder in the case at bar was cleary a prohibited *ex parte* communication which cannot go ignored.

VII. THE STATE IS INCORRECT THAT THE OUT-OF-COURT STATEMENTS OF THE NON-TESTIFYING DEFENDANT AND CO-DEFENDANT ARE SUFFICIENTLY INTERLOCKING AND RELIABLE TO MEET THE REQUIREMENTS OF THE CONFRONTATION CLAUSE.

The Defendants and the State apparently concur that as a matter of law a determination of error on the issue of rejoinder of the Defendants in the instant case rests on the indicia of reliability of the statements made by the Defendant and co-defendant. While the 1990 amendment to Florida Statute Section 90.804(2)(c) may have eliminated the Florida statutory prohibition against the admission of the statements at issue in the case at

bar, it could not affect the Bruton constitutional prohibition and could not waive an accused's constitutional rights. Williams v. State, 611 So. 2d 1337 (Fla. 2d DCA 1993).

The State concludes that the statements of the Defendant and the co-defendant in the instant case survive Bruton analysis because they were interlocking and lacked any significant discrepancies. (Answer Brief, p. 56). The State points to details of events leading up to the shooting, details of the stolen gun and car, and details of the disposal of the gun and car after the murder. (Answer Brief, pp. 56-57). The only evidence as to the role played by DOUGLAS in the shooting was his statement to the co-defendant "shoot him" recounted in two conflicting versions by Detective Morin. (See Initial Brief, p.55, R. 932, R. 5192). While the State contends that this inconsistency is not significant, where the State has selectively adopted only those statements tending to prove its case against both defendants from among a great many conflicting statements, where the circumstances surrounding these statements render them unreliable, where the roles played by the defendants is a material issue, and where during the trial both defendants accused each other of being solely responsible for the murder forcing each to defend against the other, any discrepancy is significant.

It is not enough that the statements interlock on a great many details. "Particularized guarantees of trustworthiness" must be shown from the totality of the circumstances, and the relevant circumstances include only those that surround the making of the statement and that render the declarant particularly worthy of belief. Idaho v. Wright, 497 U.S 805, 110

S.Ct. 3139, 111 L.Ed.2d 638 (1990). Adequate indicia of reliability cannot be found from subsequent corroboration of the criminal act. State v. Ryan, 103 Wash.2d 165, 174, 691 P.2d 197 204 (1984). An examination of the totality of the circumstances surrounding the making of the statements in the case at bar shows that these statements were not sufficiently reliable to satisfy the Confrontation Clause. Unlike in Glock v. Dugger, 537 So. 2d 99 (Fla. 1989); Puiatti v. State, 521 So. 2d 1106 (Fla. 1988); and Grossman v. State, 525 So. 2d 833 (Fla. 1988), in the instant case there was no joint confession or other independent recounting of the events. The circumstances surrounding the making of the statements by each of the defendants, as more particularly demonstrated below, renders each statement unreliable and unworthy of belief.

Statements of DOUGLAS ESCOBAR

The version of the shooting advanced by the State was the version first suggested to DOUGLAS by Detective Morin that Morin "wanted him to believe" (R. 928, 949). While DOUGLAS was in intensive care under heavy doses of Morphine (R. 1069-1074), Detective Morin suggested to DOUGLAS that DENNIS told the detectives that he had fired the shot, and that DOUGLAS didn't fire a single shot, DENNIS fired the shot. (R. 5191, 5199). DOUGLAS had been overheard to say, "I killed a policeman in Miami" and "I killed an officer" and "drew gun on me, start to shoot." (R. 886). During his statements to Officer Morin, DOUGLAS repeatedly denied his involvement in the shooting, but not his presence at the scene, saying that he is "not a killer" (R. 927), "only a car thief" (R. 928), "not a murderer" (R. 929,

5198), and "not a cop killer" (R. 928). DOUGLAS also stated that he knew he was guilty and that it was hard telling on himself (R. 945, 5222, 5226). The only facts apparent from DOUGLAS' statement regarding the shooting are that he vacillated about his guilt and that if the police were willing to suggest that DOUGLAS had not been the triggerman (which at that time they had no idea of who the triggerman was), then DOUGLAS was willing to concede that he had not been the triggerman. Throughout the questioning by Detective Morin, DOUGLAS repeatedly expressed great concern about what DENNIS had told them (R. 930, 940, 948, 5201-2) raising the reasonable inference that DENNIS might have a different version of the incident. Even a year after the statements by both DOUGLAS and DENNIS, the police were not sure of the roles played by each defendant and were continuing to attempt to elicit information from DOUGLAS about the shooting. When the Defendant, in prison for an unrelated crime in California, was questioned by Detective Morin a year after the original statements, the following colloquy ensued:

> Detective Morin: Did you believe that perhaps this police officer was going to do it to _you_ and is that why _you_ got scared and _you_ shot him? [emphasis supplied]
>
> DOUGLAS: Yes, that's what I thought of . . . what I thought was going to happen. (R. 959)

Conspicuously absent from this conversation was any reference to DENNIS being the triggerman and it explicitly implicated DOUGLAS as the triggerman.

Statements of DENNIS ESCOBAR

While DENNIS' statements were fraught with _Miranda_ problems and should have been excluded (as explained in the Initial Briefs of DENNIS ESCOBAR),

even if properly admitted these statements were wholly unreliable and unworthy of belief. After unsuccessful attempts to elicit information from DENNIS, Detective Morin told DENNIS that both DENNIS' wife and DOUGLAS had given him information about who shot the policeman. Morin told DENNIS that DENNIS' wife had told the police that DENNIS told her that DOUGLAS shot the police officer. (R. 758). Morin also told DENNIS that DOUGLAS told police that DENNIS shot the police officer. (R. 758). DENNIS then agreed with the first version offered by Morin and stated that on the night of the officer's murder he was home with his wife when DOUGLAS came in and said he had just killed a policeman. (R. 5241-5242, 5349). When Morin rejected this version and walked out (R. 5242), DENNIS called Morin back and said he would tell him what he wanted to know if he would leave his wife alone (R. 5245). DENNIS had expressed great concern about his wife and his children and was told that his wife was in custody and that if no family members were found HRS would take his children (R. 847, 5355-5377). Having agreed to tell the officers what they wanted to know, DENNIS then gave a statement ultimately adopting the second version previously offered by Detective Morin - that DENNIS himself had shot the police officer. It is noteworthy that DENNIS' statement to Morin was given in Spanish outside the presence of any other Spanish speaking person although other Spanish speaking witnesses were readily available (R. 5349), without any other independent corroboration, and Detective Morin was the victim's fellow comrade for fourteen years (R. 5128) and Morin was under a lot of pressure for not having solved the crime (R. 5295-5296). It is also noteworthy that to induce DENNIS to give a statement, Detective Morin tried to convince DENNIS

that DOUGLAS had given a statement by leaving the room and having another officer read to DENNIS in Spanish a statement written in English (R. 5256-5257). Although Morin testified that he did not believe that actual facts of the case were read to DENNIS (R. 5258), it is a reasonable inference that the mere recitation of the police officers introducing themselves and advising DOUGLAS of his constitutional rights (R. 5258-5259) was not sufficient to accomplish the purpose of convincing DENNIS that DOUGLAS had given an incriminating statement, and at least some facts of the case had been provided to DENNIS prior to his statement. These "facts" suggested to DENNIS may well have included the police version of how the incident took place. During interrogation DENNIS had said he "felt like Morin was trying to involve him in something he was not involved in" (R. 806, 5313), then gave two different versions of who shot the police officer (R. 5248-5249, 5349, then again placed the blame on DOUGLAS immediately after giving his statement to Morin by telling his wife in a telephone conversation (monitored by a California corrections officer) that DOUGLAS had "shot a police officer" (R. 35, 849). Detective Morin acknowledged that the version of events offered by DENNIS was only "one of the stories," as evidenced by the following colloquy at trial:

> Q: Did Dennis tell you that Douglas shot the police officer?
>
> A: He never said that.
>
> Q: Think a moment.
>
> A: I'm sorry. He told me that as one of the stories.

The State apparently selected only those portions of the statements

of DENNIS and DOUGLAS that coincided, even though not reliable, to present a consistent theory of the case. Where the initial statements of DENNIS and DOUGLAS about the shooting were not sufficiently trustworthy to be believed by the police, where the issue of who was the triggerman was still in conflict a year later, and where the circumstances surrounding the making of these statements were totally unreliable, then certainly at the time of trial these statements were not sufficient to withstand Constitutional Confrontation Clause problems.

VIII. THE LIMITATION OF CROSS-EXAMINATION OF AN EXPERT WITNESS WHERE INFORMATION SOUGHT WAS RELEVANT TO SHOW POTENTIAL BIAS WAS REVERSIBLE ERROR, EVEN IN THE ABSENCE OF A PROFFER.

The State argues that the limitation of the cross-examination of the expert witness in the case at bar is not preserved for appeal since defense counsel did not proffer what the anticipated response would be to defense counsel's question, "When is the last time you ever found anyone incompetent in a court of law?" (Answer Brief, p. 59). Although the State suggests that this question was a mere fishing expedition by defense counsel, the question was clearly an attempt by defense counsel to show bias on the part of the expert witness, to the detriment of the Defendant. This case is not one where this Court would be forced to speculate about the relevancy of the information sought to be elicited.

The State's argument that this issue is not preserved for appeal since defense counsel made no proffer is without merit. This Court has held, even in the absence of a proffer, that where a criminal defendant in a capital case, while exercising his Sixth Amendment right to confront and cross-examine the witnesses against him, inquires of a key prosecution

witness regarding matters which are both germane to that witness' testimony on direct examination and plausibly relevant to the defense, an abuse of discretion by the trial judge in curtailing that inquiry may easily constitute reversible error. Coxwell v. State, 361 So. 2d 148 (Fla. 1978).

The Fourth District Court of Appeal has also found reversible error where the trial court improperly limited the scope of cross-examination of an expert witness where the information sought was relevant to show potential bias. In Gold, Vann & White, P.A. v. DeBerry, 639 So. 2d 47 (Fla. 4th DCA 1994), the trial court limited the defense requests for discovery and cross examination related to the witness's income derived from rendering expert witness services on behalf of clients represented by plaintiff's counsel. The Fourth District Court of Appeal found this limitation to be an abuse of discretion by the trial judge, even in the absence of a proffer, where the information sought was relevant to show the witness's potential bias. Id. at 56. See also, Pomeranz v. State, 634 So. 2d 1145 (Fla. 4th DCA 1994). If limitation of the cross-examination in the civil case of Gold, Vann & White was an abuse of discretion, then surely the limitation of cross-examination in the case at bar was an abuse of discretion where the Defendant is a criminal defendant in a capital case.

The State argues that the limitation on cross-examination in the case at bar is harmless since the witness was a disinterested, court-appointed expert, and since cross-examination of the doctor's conclusions was permitted. (Answer Brief, p. 60). The witnesses, however, were not as disinterested or evenly divided as suggested by the State. Two witnesses presented by the Defendant concluded that the Defendant was incompetent (R.

603, 637), while two witnesses presented by the State concluded that the Defendant was competent. (R. 544, 578). One of the fundamental purposes of cross-examination is to test, weaken, or demonstrate the impossibility of the testimony on direct examination, and the scope of cross-examination cannot be unduly limited so as to prevent counsel from carrying out this purpose. Eberhardt v. State, 550 So. 2d 102 (Fla. 1st DCA 1989). A showing of significant bias on the part of the State's expert witness would clearly have weakened the impact of his testimony and it cannot be said that the limitation of cross-examination was harmless as to the critical determination of whether the Defendant was competent to stand trial. That defense counsel was afforded an opportunity to cross-examine the conclusions of the expert witness does not render the limitation harmless since it is the showing of prejudice or bias that goes to the very heart of these conclusions.

IX. THE STATE'S ANALYSIS OF THE FACTS AND LAW CONCERNING THE TRIAL JUDGE'S REFUSAL TO CONDUCT A NEIL INQUIRY IS INACCURATE.

The State first argues that the Defendant, DOUGLAS ESCOBAR, failed to preserve the issue that the trial court erred in refusing to conduct a Neil inquiry since the trial court "explicitly required" that the Defendant, DOUGLAS, specifically join in any objections or motions he wished to adopt, and DOUGLAS did not specifically adopt all objections by the co-defendant. (Answer Brief, pp. 60-64). A fair reading of the dialogue between the trial judge and counsel for the Defendant, DOUGLAS, reveals that the trial judge did not "require" that DOUGLAS join in objections, but rather suggested that this was the better practice for appellate purposes. In its recitation of the dialogue between DOUGLAS' counsel and the trial judge,

the State omits the following by the trial judge:

> MR. GALANTAR: . . . I would like the record to reflect with the Court's permission that an objection on behalf of Mr. Carter's client or my client would be the same as if it were one unless we specify otherwise . . .
>
> THE COURT: Okay. [emphasis supplied].
>
> MR. GALANTAR: Just so we don't have the constant repetetiveness.
>
> THE COURT: Here is my concern. For me I don't care but the appellate court might have some concern. [emphasis supplied].

(R. 2186-2187). Again later during the jury selection proceedings the following comments were made:

> MR. GALANTAR: Did we agree that I have to join in on all these - -
>
> THE COURT: I would suggest on these that you should. [emphasis supplied].

(R. 3681). While the trial court indicated its preference that the defendants specifically join in objections for purposes of the appellate record, it did not make this suggestion mandatory and specifically said "okay" to defense counsel's request that the objections of one defendant be deemed adopted by the other.

The State further argues that the Defendant, DOUGLAS, "affirmatively requested that no Neil inquiry be made of the State or Defendant until after the completion of jury selection." (Answer Brief, p. 62). This argument by the State is misleading and inapplicable since that dialogue occurred during discussion regarding Neil inquiries against the co-defendant (R. 4017) and before completion of the State's strikes (R. 4154),

was offered only as a suggestion to the trial judge but not adopted by him, did not imply that the right to request a Neil inquiry was being waived by the Defendant but only that a greater record would be better (R. 4017), and occurred prior to many of the requests for a Neil inquiry by the co-defendant (R. 4123, 4135, 4144, 4150, 4153-54). It is absurd for the State to suggest that the Defendant waived his right to request a Neil inquiry based solely on philosophical speculation in advance of the very events that gave rise to the need for an inquiry.

The State further argues that where the Defendant did not renew or reserve earlier objections immediately prior to the jurors being sworn he has not properly preserved this issue for review based on this Court's ruling in Joiner v. State, 618 So. 2d 174, 176 (Fla. 1993). (Answer Brief, p. 63). The strict requirements of Joiner, however, are not applicable in the instant case where the trial court made it clear that it understood that the issue in question would have to be resolved by an appeal and the Defendant's silence when the jury was subsequently seated neither misled the trial court nor the State into the belief that the issue was not preserved. Langdon v. State, 636 So. 2d 578 (Fla. 4th DCA 1994). Abundant references to the certain appellate review which would follow the trial of the instant cause were made throughout the entire trial, and the trial judge specifically acknowledged that the jury selection issues would be reviewed by an appellate court (R. 4015). Also see Schummer v. State, 654 So. 2d. 1215 (Fla. 1st DCA 1995). Neither the trial court nor the State could have believed that this issue would not be raised on appeal and the Neil issue is preserved as to both DENNIS and DOUGLAS ESCOBAR.

The State argues that since three of the jurors challenged were alternates who would not have served in any event, the State's use of peremptory challenges did not encroach on the Defendant's constitutional guarantees, citing Rector v. State, 605 So. 2d 559 (Fla. 4th DCA 1992), rev. den. 613 So. 2d 8 (Fla. 1993). Notwithstanding that Rector does not even address the "reprehensible appearance of discrimination in court procedure" (see State v. Slappy, 522 So. 2d 18, 20 (Fla.), cert. denied, 487 U.S. 1219, 108 S. Ct. 2873, 101 L. Ed. 2d 909 (1988)) or the rights of the jurors being discriminated against, Rector is inapplicable since an alternate juror was in fact later called to serve in the instant case (R. 4098) and since this argument of the State is not dispositive of the other eleven jurors who were part of the main jury panel. Further, the State's actions with regard to the alternate jurors can be used to evaluate the State's racially discriminatory motives and actions which pervaded the entire jury selection process. Regardless of the composition of the final jury panel, including alternate jurors, in Florida even the exercise of a single racially motivated prosecution strike is constitutionally forbidden. Slappy, at 21; Smith v. State, 574 So. 2d 1195 (Fla. 3rd DCA 1991). The State correctly points out that DOUGLAS joined in the challenge for cause of jurors Bacon and Westmore (Answer Brief, pp. 67-68) and DOUGLAS is not entitled to assert error on his own behalf as to jurors Bacon and Westmore. Appellate counsel for DOUGLAS points out, however, that he agreed to present this issue on appeal on behalf of both DOUGLAS and DENNIS so that this Court would not be burdened with duplicitous arguments in both briefs and had a duty to assert DENNIS' right to review as to jurors Bacon and

Westmore; this error is preserved as to DENNIS.

The State further argues bad faith on the part of counsel for DENNIS in that he announced he would continue to make Neil objections, "regardless" of what the prosecutor would do. (Answer Brief, p. 69). This argument grossly mischaracterizes the statement by DENNIS. This statement by DENNIS was made after the State's acceptance of the twelve jurors wiht the comment that six of the jurors were black. (R. 3952). DENNIS responded, "I would like the record to reflect until such time they are sworn I will make the same objections regardless of what he does right now." Rather than an indication of bad faith, DENNIS was merely complying with Joiner v. State, 618 So. 2d 174, in preserving his objections for appeal.

In asserting race-neutral reasons gleaned from the record as to jurors Bacon, Westmore and Fitzpatrick, the State conspicuously omits any race-neutral reasons for striking the remaining two black jurors complained of herein, Roberson and Jeanty. (Answer Brief, pp. 67-69). This is so because the record is devoid of any race neutral reasons whatsoever for striking these jurors. As to a race-neutral reason for challenging oriental juror Yamamoto, the State contends that this juror was correctly challenged for cause because of her views on the death penalty. (Answer Brief, pp. 70-71). Contrary to the State's assertions that this juror was unable to follow the law and impose the death penalty, and that this juror was not rehabilitated (Answer Brief, p. 71), the record clearly reflects that these arguments are without any merit. In response to the trial judge's questions to her whether she could follow the law and impose the

death penalty, juror Yamamoto responded three times with an unequivocal "yes." (R. 2097-2098). When asked by the State how she would be able to put aside her feelings and come to that decision, Yamamoto responded, "If I absolutely believed that the person was absolutely guilty, I could, yeah." (R. 2099). The State then, in an obvious effort to confuse the juror and purposely omitting any explanation of "reasonable doubt," posed the following question:[2]

> MR. LAESER: When you say absolutely guilty, the law requires certain level of proof, called beyond a reasonable doubt and I don't want to go into a long explanation of that, but in your mind if there was any doubt whatsoever, even the tiniest amount of doubt, would that prevent you from voting for the death penalty?

(R. 2099). Although juror Yamamoto responded affirmatively to that question, she immediately thereafter strongly reaffirmed to the trial court and counsel for the Defendant that she could follow the law as instructed regardless of her personal feelings (R. 2102-2105) and thus was fully rehabilitated. The State further argues that the trial court was correct in not requiring a race-neutral reason for challenging juror Yamamoto since the defense did not demonstrate that this group was "large enough that the general community recognizes it as an identifiable group in the community." (Answer Brief, p. 71). The State's argument is without merit since oriental juror Yamamoto is, as a matter of law, a member of a cognizable class. As the Court of Criminal Appeals of Alabama noted in Wilsher v. State, 611 So. 2d 1175, 1184 (Ala. Cr. App. 1992), the United States

[2]The State did not ask this question in a similar manner to any other juror.

Supreme Court found in Hernandez v. New York, 500 U.S. 352, 111 S. Ct. 1859, 114 L. Ed. 2d 395 (1991) that the interpretation that Batson[3] was intended to "apply to all ethnic and racial groups" was correct. Following Hernandez, at least one court has explicitly held that Batson may be used to challenge the strikes of Asian veniremembers. State v. Jordan, 171 Ariz. 62, 65, 828 P. 2d 786, 789 (1992). Numerous courts from around the country have also referred to Asians as a distinct cognizable group.[4]

XIII. THE STATE MISAPPREHENDS THE PROHIBITION AGAINST EX PARTE COMMUNICATIONS SET FORTH IN ROSE, SPENCER AND IN RE DEKLE.

The STATE's argument adopts the Special Master's finding that "there was no possible prejudice to any party . . . since there was no substantive communication, alteration or modification of the sentencing order." (App. 87). Both the State and the Special Master implicitly and erroneously conclude that ex parte communications are subject only to harmless error analysis, the harm being measured by the degree of prejudice suffered by the excluded party. The STATE has ignored the underlying principles of the prohibition against ex parte communications as expressly set forth in Rose v. State, 601 So. 2d 1181 (Fla. 1992), Spencer v. State, 615 So. 2d 688 (Fla. 1993), and In re Dekle, 308 So. 2d 5 (Fla. 1975), to wit: to protect the appearance of impartiality and integrity on the part of the trial judge.

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[3]Batson v. Kentucky, 476 U.S. 79, 106 S. Ct. 1712, 90 L. Ed. 2d 69 (1986).

[4]U.S. v. Banks et al., 10 F. 3d 1044 (4th Cir. 1993); U.S. v. Briscoe, 896 F. 2d 1476 (7th Cir. 1990); Schreiber v. Salamack, 619 F. Supp. 1433 (D.C.N.Y. 1985)' Russell v. State, 607 So. 2d 1107 (Miss. 1992); Baynard v. State, 518 A. 2d 682 (Del. 1986); People v. Beard, 636 N.E. 2d 658 (Ill. App. 1 Dist. 1993);

Without regard to this Court's holding in Rose that it was not concerned with whether an ex parte communication actually prejudices one party at the expense of the other, Id. at 1183, the STATE nevertheless argues at length that Rose and Spencer are distinguishable from the case at bar because of the prejudice suffered by the defendants in Rose and Spencer and the lack of prejudice suffered by the Defendants in the case at bar. (Answer Brief, pp. 77-78). The STATE notes that in Rose the State had sent a copy of a proposed order, denying the motion without a hearing, to the judge, without furnishing a copy to the defendant. (Answer Brief, p. 78). The STATE then concludes that Rose could not apply to the case at bar since what transpired in the instant case can not be deemed a "conversation" and was "strictly administrative." (Answer Brief, p. 78). The STATE further concludes that Spencer could not apply to the case at bar since in Spencer the judge and prosecutor had admittedly been involved in a substantive discussion about sentencing procedures and the prosecutors were actively assisting the judge in the proofreading of the order, and in the case at bar the parties had long since presented all of their arguments to the judge and the jury had already recommended death. (Answer Brief, p. 78). The STATE conspicuously ignores this Court's view of ex parte communications as expressed in In re Dekle.

The STATE's position erroneously relegates the issuance of a death sentence order to a mere ministerial task. The STATE implies that once the jury has issued its recommendation and the parties have been heard, and the formulation of the ultimate sentencing decision can be made without further input from the defense, the judge's role in issuing a final order prior to

pronouncement in open court is simply adminstrative and the judge is therefore automatically immune from undue influence or improper considerations. The STATE's further urging that what transpired in the instant case was insubstantial and was not a "conversation" as in the facts of Rose, invites the notion that judges may without fear of reprisal meet privately with a single party so long as the judge is not "actively" soliciting comments and so long as that party delivers a message cloaked by nothing more than a wink, a nod, or "look's good to me."

The STATE refers to the dangers inherent in the facts of Rose, as pointed out by this Court, that "a judge is placed in the position of possibly receiving inaccurate information or being unduly swayed by unrebutted remarks about the other side's case" (Answer Brief, p. 77), but ignores the fact that that is precisely the danger inherent in the case at bar. While the testimony of the judge and the prosecutor in the case at bar offered a vague version of events resulting in the Special Master's finding that there was no substantive communication, alteration or modification of the sentencing order (App. 87), clearly there was the possibility of such a scenario. The prosecutor who met alone with the judge in chambers for a quarter-hour, who had no idea why he was called to chambers, who without explanation was given an order to review which had not been read in open court while the judge was still at work at his word processor, and who was the prosecutor in charge of legal issues, easily could have offered recommendations or advice, solicited or unsolicited by the judge. Since the death sentence orders in the case at bar remained unpublished to all but the prosecutor who met alone with the judge prior to

pronouncement in open court, certainly the possibility existed that the judge could have revised his orders to comport with positive or negative comments offered without any special regard to intent by the prosecutor. The very possibility of this scenario, rather than its occurrence or non-occurrence, is the danger warned of in Rose, Spencer and In re Dekle - the appearance of impropriety damaging to the judiciary and fatal to the appearance of impartiality on the part of the tribunal.

As a matter of public policy, it is important to send a strong message to the judiciary that ex parte contacts, whether intentional or merely a casual indifference to the rights of the excluded party, will not be tolerated. Anything less than an absolute prohibition against these encounters compels a line of inquiry which can only result in a murky slippery slope. Alleged violations will have to be examined on a case by case basis with attention to what constitutes permissible versus impermissible "communications," what constitutes "substantive" discussions versus inconsequential matters, what degree of prejudice is required to be suffered before the threshhold is met, and when does the communication become harmful rather than harmless. An additional problem with a case by case analysis is that in almost all cases the only evidence of the details of the improper communication can only be supplied by the judge and the party participating in the communication, requiring impartial fact finding and often timely and costly proceedings. Even when the judge and participating party are sucessful in exculpating themselves with their own testimony, other than to fellow "officers of the court" this biased testimony coupled with the appearance of impropriety is unlikely to

persuade the public at large or the excluded party that the trial judge has acted with impartiality and integrity thus rendering hollow the reason for the prohibition against ex parte communications.

XV. THE STATE MISCONSTRUES RICHARDSON AND MISSTATES THE RELEVANT FACTS IN THE CASE AT BAR WHICH RELATE TO THE RICHARDSON ISSUE ON APPEAL.

The STATE argues that (1) there was no Richardson violation as to DOUGLAS ESCOBAR where counsel's request to speak to the excluded witnesses constituted a request for continuance (Answer Brief, p. 85); (2) the issue has not been preserved since no defense attorney specifically requested a Richardson inquiry (Answer Brief, pp. 86); (3) an adequate Richardson inquiry was conducted (Answer Brief, pp. 87-88); and (4) that error is harmless (Answer Brief, pp. 89-91). Each of the STATE's arguments must fail due to incorrect or inapplicable statements of fact, and erroneous or inapplicable conclusions of law.

The STATE's first argument, that DOUGLAS' counsel's request to speak with the excluded witnesses was in effect a request for a continuance (Answer Brief, p. 85), is based on the STATE's false factual premise that DOUGLAS never sought to have the excluded witnesses testify on his behalf. Counsel for DOUGLAS specifically requested an opportunity to speak with the four new witnesses who were present and available to testify (R. 6200) and this could have easily been accomplished with a brief recess. The STATE ignores the fact that when the trial judge directly asked DOUGLAS ESCOBAR if there were any other witnesses he wanted to call, he replied that he wanted the four witnesses who had been excluded. (R. 6254). A continuance of the penalty proceedings was not requested. The STATE's reliance on Gore

v. State, 599 So. 2d 978 (Fla. 1992) is misplaced since in Gore there was a motion for continuance to secure a witness not present and available to testify, unlike the four witnesses in the case at bar. The issue at bar is clearly one of improper exclusion of witnesses and not one of whether a continuance should have been granted, especially when one had not been requested.

The STATE's second argument, that DOUGLAS ESCOBAR did not preserve the issue of the excluded witnesses for review since no defense attorney ever requested any Richardson inquiry (Answer Brief, p. 86) is also without any merit and the STATE obviously misconstrues Richardson and its progeny. This Court has unequivocally held that the burden of initiating a Richardson hearing is placed on the trial judge rather than the parties. Brazell v. State, 570 So. 2d 919 (Fla. 1990). The STATE is correct that the judge must be alerted to the necessity of conducting a Richardson inquiry, which is met by a clear showing of the need for a Richardson hearing. Brazell, at 921. The Defendants' request to present the testimony of four witnesses who had just become available from out of the country, who were present and ready to testify, and the imposition of the harshest sanction available for a discovery violation - the exclusion of the witnesses - presented a clear showing of the need for a Richardson hearing.

The STATE cites cases where a Richardson claim has been unpreserved, none of which are applicable. In Dailey v. State, 594 So. 2d 254 (Fla. 1992), defense counsel rejected the court's offer of a special voir dire of the witness where a photograph had not been furnished in discovery. In the

case at bar, the court rejected defense counsel's request to speak with the witnesses and summarily excluded the testimony. In Lucas v. State, 376 So. 2d 1149 (Fla. 1979) the prosecutor charged with the discovery violation acquiesced in the court's ruling. There is no evidence that DOUGLAS acquiesced in the exclusion of the witnesses. Matheson v. State, 500 So. 2d 1341 (Fla. 1987); Andrew v. State, 621 So. 2d 568 (Fla. 4th DCA 1993); and Taylor v. State, 589 So. 2d 918 (Fla. 4th DCA 1991) are similarly wholly inapplicable.

The STATE also argues that the Defendant and counsel failed to alert the trial judge to the necessity of initiating a Richardson inquiry. (Answer Brief, p. 86). Contrary to the STATE's assertions, the counsel's request to speak with the witnesses and the Defendant's request that they be allowed to testify in his behalf are hardly "mute" positions. The STATE's statement that "counsel for Douglas expressed no desire to call these individuals as witnesses, and had previously stated that they did not intend to call the family members Carter was calling for Dennis" (Answer Brief, p. 86) is a misstatement of fact controverted in the STATE's own Answer Brief (at p. 84) where at the hearing immediately preceding the commencement of the sentencing proceedings counsel for the Defendant is quoted as saying, "Even though the time is as late as it is, I didn't know these people existed . . ."

The STATE's third argument, that the trial court conducted an adequate Richardson inquiry (Answer Brief, pp. 87-88), wholly ignores this Court's pronouncements as to what constitutes an "adequate" inquiry. This Court has said that at the very least such an inquiry must cover questions such

as whether the violation was willful, whether the violation was trivial or substantial, and most importantly, what effect, if any, did if have on the aggrieved party's ability to properly prepare for trial. Smith v. State, 372 So. 2d 86 (Fla. 1979); Richardson v. State, 246 So. 2d 771 (Fla. 1971). Although the circumstances of the discovery violation, involving visa and financial problems, were known to the court one week prior to the exclusion of the witnesses (R. 5965-67), and by the judge's very exclusion of the witnesses he implicitly deemed the violation substantial, the judge never addressed the critical question of what effect, if any, this violation had on the State's ability to prepare for trial, or as in this case for the sentencing proceeding. Imposing the harshest sanction possible, exclusion of witnesses, without even examining the prejudice, if any, to the State was a clear violation of the principles of Richardson.

The STATE's position that prejudice refers only to the defendant's ability to prepare for trial (Answer Brief, p. 87) is without merit. The proper inquiry for the judge is whether the discovery violation prevented the aggrieved party from properly preparing for trial. Smith v. State, 372 So. 2d 86 (Fla. 1979). There was no showing, or even inquiry, in the case at bar that the aggrieved State would be unduly prejudiced in its preparation for trial as a result of allowing the testimony of four new defense witnesses with respect to mitigating circumstances in the Defendants' lives. There was no attempt by the trial judge to even seek a simple expedient, such as a short recess, to remedy the situation. Where the trial judge failed to adequately conduct a Richardson inquiry, the failure is per se reversible error. Smith v. State, 500 So. 2d 125 (Fla.

1986).

The State's harmless error analysis (Answer Brief, pp. 88-91) is inapplicable since this Court has conclusively held that the failure to hold a Richardson hearing is per se reversible error. Smith v. State, 500 So. 2d 125 (Fla. 1986). The cases relied on by the STATE (Answer Brief, p. 90) bear no logical or legal relevance to the case at bar. The STATE concludes that the exclusion of the witnesses was harmless beyond a reasonable doubt and offers its own defense strategy by suggesting that DOUGLAS mistakenly chose not to call his mother and sister, the "two individuals most intimately familiar with general family background matters" (a conclusion which is without basis or foundation), and chiding DOUGLAS for not adopting his mother's testimony while in the same paragraph minimizing its import. (Answer Brief, p. 90). In spite of the STATE's lengthy irrelevant opinions about who could have best testified to what facts, and which witnesses could supply more or better details, complete with expert opinions on the mitigating value of service in Mao's Red Guards or the Peruvian Shining Path (Answer Brief, p. 91), the fact remains that the testimony of four witnesses intimately familiar with the Defendant's background and special circumstances was wrongfully excluded. In excluding these witnesses the Defendant was denied mitigating evidence possibly critical to the determination of his sentence, this error was harmful, and this violation is per se reversible under Richardson.

CONCLUSION

Based upon the foregoing, the Defendant requests that this Court reverse his conviction and sentence of death and remand the case to the trial court for a new trial and new sentencing or, in the alternative, remand the case for a new sentencing hearing before a new sentencing jury or, in the alternative, remand the case for a new sentencing hearing before the Judge or a different Judge.

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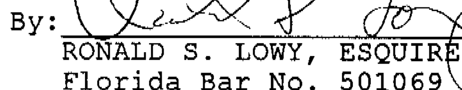
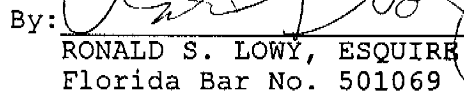
Telephone: (305) 673-5699

By: 
RONALD S. LOWY, ESQUIRE
Florida Bar No. 501069

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was served upon Ralph Barreira, Assistant Attorney General, Office of the Attorney General, 401 N.W. 2nd Avenue Suite N921, P. O. Box 013241, Miami, Florida 33101, and John Lipinski, Esquire, 1455 N.W. 14 Street, Miami, Florida 33125 by U.S. mail this 23rd day of September, 1996.

By: 
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