IN THE SUPREME COURT OF FLORIDA

RODNEY TYRONE LOWE,

Appellant,

vs.

STATE OF FLORIDA,

Appellee.

CASE NO. 77,972

REPLY BRIEF OF APPELLANT

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PRELIMINARY STATEMENT

As to all issues, and particularly those on which appellant does not specifically reply to appellee's answer brief, appellant will rely on arguments made in his initial brief.

ARGUMENT

POINT I

THE TRIAL COURT ERRED IN DENYING LOWE'S MOTION TO SUPPRESS HIS CONFESSION WHERE THE OFFICERS DELIBERATELY BYPASSED LOWE'S REQUEST FOR AN ATTORNEY.

a. Once Lowe requested counsel all police initiated interrogation had to cease. The police violated this rule by ignoring his request for counsel, and using Ms. White to pry incriminating statements from him.

i. Further interrogation of Lowe after his invocation of counsel.

ii. The use of Ms. White as a police agent.

The state answers that no overreaching as condemned by Edwards[1] or Miranda[2] occurred when the police allowed appellant's girlfriend to question him to find out what happened after appellant requested counsel. Conspicuously absent from the state's argument is any discussion of why this was not a psychological ploy or police trickery. The state maintains that the police did not use the girlfriend to elicit incriminating statements from appellant but just fortuitously happened to be listening when she confronted him with the evidence against him. Appellee attempts

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[1] Edwards v. Arizona, 451 U.S. 477 (1981).

[2] Miranda v. Arizona, 384 U.S. 436 (1966).

to avoid accountability for the police taking action, beyond merely listening, that was designed to elicit incriminating remarks by positing that the police told Patty the evidence against Mr. Lowe because she was a suspect in the murder herself. ("Kerby testified that they related the evidence against Appellant to Patty during their interview of her as a suspect in the murder, not because she was about to talk to Appellant.") (T-267-72). (Appellee's Answer Brief p. 27). Ignoring for a moment that no where do those record references confirm that Kerby considered Patty a suspect, the next logical question is why do the police inform a suspect of evidence against her boyfriend except to secure her cooperation in throwing suspicion away from herself?

If the record does establish appellee's inference that Kerby told Patty of the evidence against Lowe because Patty was a suspect then the implications of the officers' deliberately confronting Mr. Lowe with another suspect or accomplice and giving that suspect an opportunity to confront Mr. Lowe with the evidence against him must be examined. See Nelson v. Fulcomer, 911 F.2d. 928,934 (3rd Cir. 1990), where the police induced incriminating statements by confronting Nelson with a partner in crime who had confessed.[3] However, appellee did not respond to the citation of Nelson in

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[3] The court found the record insufficient to determine whether Nelson was advised of Moore's confession by the police or Moore at their bidding. However, the court proceeded to analyze the case under either alternative fact and then remanded for a further evidentiary hearing. Had Nelson made his incriminating remark, "how much did you tell them?", before being informed of the confession and assuming that Moore did nothing to provoke a response but enter the interrogation room, the Court found that no prohibited interrogation would have occurred. Id. at 938.

appellant's initial brief.

In Nelson the court equated the police ploy of confronting a suspect with his partner and the knowledge that the partner confessed with Miranda's prohibition against a coached line-up confrontation; in both instances a witness identifies the suspect as the perpetrator of the crime. In Nelson the fact the coached witness was also the suspect's partner did not make the ploy any less a violation of the suspects's rights. The court also found that advising Nelson of the existence of a confession by his co-defendant was the functional equivalent within the Miranda/Innis[4] prohibition of positing the guilt of the accused. The Nelson court pointed out that when the co-defendant Moore confronted Nelson, the police had just attempted to question Nelson and he had invoked his rights. The police then brought the co-defendant to the interrogation room. Thus, when Nelson made the incriminating remark "he remained the subject of a custodial interrogatory process controlled by the police." Id. at 937.

Why the police told Patty the evidence against Mr. Lowe does not change the foreseeable results of their securing her an opportunity to confront Mr. Lowe with the incriminating evidence once she had it. It cannot be said that they just inadvertently disclosed the incriminating evidence to her and that they were not responsible for her questioning him. Her participation in questioning appellant was contrived and an intended result of the officers' actions.

The decision in United States v. Vazquez, 857 F.2d 857 (1st

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[4] Rhode Island v. Innis, 446 U.S. 291 (1980).

Cir. 1988), is relevant to the legal question presented here. There Vazquez and Pizarro had separately disembarked from a plane arriving in Puerto Rico and had been separately stopped by customs. Pizarro and Vazquez gave inconsistent stories; Pizarro confessed to drug smuggling and was taken to the custom inspector's office. Shortly thereafter Vazquez was brought to the same office by different officers and burst into an incriminating exchange upon seeing Pizarro.

The First Circuit recognized this was a "difficult and close" case. Id. at 862, but concluded that the confrontation did not rise to the level of custodial interrogation. The court noted its conclusion might have been different if there was any evidence that the custom's agents sought to elicit incriminating statements from Vazquez, but there was no evidence that the agents accompanying Vazquez even knew that Pizarro was in the office where they were taking Vazquez. That record showed nothing more than that the confrontation occurred "by happenstance." Id. at 863.

The state here cannot pretend that Patty's confronting appellant with the evidence against him and questioning him to secure an admission occurred by luck or happenstance. The dissimilarities between Lowe's case and others where the courts find no illegal police conduct in arranging a meeting between the defendant and a friend or relative is striking. The police trickery and deception notably lacking in other cases is glaringly present here.

In People v. Whitehead, 508 N.E. 2d 687 (Ill. 1987), the defendant's conviction for first degree murder and his death

sentence were affirmed against his claim that the police reinitiated interrogation in violation of Edwards by arranging a confrontation between the defendant and his sister-in-law, LeAllen Starbuck, after he requested counsel. Of prime importance there was the conclusion that the decision by a Joliet officer to allow the defendant to visit with LeAllen several hours after he requested counsel did not contain any element of police trickery or overbearing. The officer had originally refused LeAllen's request to speak to her brother-in-law and did not seek her cooperation in any way. LeAllen approached the detective again at the home of the child victim and requested to talk to Whitehead so the detective told LeAllen to come to the police station. When she arrived the detective asked the defendant if he wanted to see a visitor and he indicated that he did. The detective then left them alone so "LeAllen could speak with the defendant privately" id. at 691. The court also noted:

> Moreover, there was no evidence that LeAllen intended either to persuade the defendant to give a statement to the police regarding the missing child or to pass along to the police any statements the defendant might make to her.

508 N.E. 2d 691.

These indicators of police overbearing and trickery, whose absence was of such critical importance to the conclusion in Whitehead, actually occurred here. Before going to see Lowe, White expressed to the police her intention to persuade Lowe to give a statement, i.e., to find out what happened, and clearly agreed to pass along to the police anything Lowe said because she agreed that they could listen in and tape the entire conversation.

The Whitehead court also considered the effect of allowing a family member to speak to the accused while in custody noting that communication with family is normally a comfort to a person in custody. In rejecting the defendant's argument that family members should not be allowed to talk to the accused once he requests counsel, the Whitehead court cautioned against police trickery in using family members in such situations:

> So long as police have not incited or coached family members to prompt a confession, it is not a proper area for judicial intrusion to perpetuate the incommunicado nature of police custody.

Id. at 692.

Here the police did just that: a visibly upset Patty got even more upset as Kerby and Green related to her the evidence they had against her boyfriend, Mr. Lowe. Thus, the officers incited White to secure a confession from Lowe by informing her of the evidence against Lowe. They may have told this information before, as well as after, she expressed a desire to talk to appellant. Surely this incriminating information helped Patty carry out her stated intention to satisfy her suspicion that Lowe was involved in the murder and find out from Lowe what happened for she immediately began questioning Mr. Lowe when she entered the interrogation room. This is not, as appellee wishes, a case of the police simply allowing a girlfriend to visit a suspect who had requested counsel and "hoping" that he will incriminate himself.

Next appellee states that the secret tape recording is of "no import" because Patty would have been able to testify to any statements made to her by appellant (Appellee Answer p. 27). This

conclusion is premature and cannot stand if Patty was acting as an agent of the police.[5] Moreover, appellant cited cases in his initial brief discussing the standard to determine if Patty was a state agent but appellee completely ignores these cases, except to say that in Peoples v. State, 612 So. 2d 555 (Fla. 1992), the co-defendant agreed to obtain incriminating information. Presumably, appellee would opt for a standard that no one can be a state agent unless he or she explicitly agrees to do so, but such a standard would not account for incidents of police overreaching or trickery where, for example, a brother is found to have been used by the police as "an unwitting agent of law enforcement." State v. Calhoun, 479 So. 2d 241,245 (Fla. 4th DCA 1985).

Appellee completely ignores this Court's holding in Peoples and the Supreme Court's admonishment first stated in Maine v. Moultron, 474 U.S. 159,176 (1985), that the state's "knowing exploitation of an opportunity to confront the accused without counsel being present is as much a breach of the State's obligation not to circumvent the right to the assistance of counsel as is the intentional creation of such an opportunity." (Emphasis appellant's). Adroitly, the state purports to distinguish numerous cases on whether Patty was a de facto agent of the state, by responding to the cases cited for another point of law concerning

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[5] Appellee claims Brown v. State, 349 So. 2d 1196 (Fla. 4th DCA 1977), allows police to eavesdrop on inmate's conversations but Brown does not mean the officers can violate the prohibition of Maine v. Moultron, 474 U.S. 159 (1985) or Massiah v. United States, 377 U.S. 201 (1964), to deliberately elicit statements from an accused in the absence of counsel or that the police can send someone in to interrogate the suspect in violation of Miranda/Innis.

the admissibility of appellant's statement, the employment of threats and promises by Patty to Mr. Lowe to secure his agreement to speak to the police. (Appellee answer p. 28). Of course cases are easily distinguishable if the reason for their citation is misstated or ignored.

At page 30 of its answer brief, appellee correctly acknowledges that the "analysis of whether particular words or conduct are likely to elicit incriminating statements `focuses primarily upon the perception of the suspect, rather than the intent of the police.'" Innis, supra at 301, 100 S. Ct. at 1690. Appellee focuses on Mr. Lowe's ignorance that the police were listening to his conversation with Patty as evidence that he could not have perceived that he was being forced to incriminate himself. Thus, appellee interprets the Innis standard to absolve the officers' responsibility for the foreseeability of their actions when their trickery is unknown to the accused at the time it occurs.

This is a situation where Mr. Lowe would have felt compelled to respond upon being confronted by his girlfriend insistently demanding that he explain the evidence the police had against him and being pressured by her threats to leave him and promises of love and money unless he did so. Here the words and action of police which are likely to elicit an incriminating response were their supplying the girlfriend with the information for her questioning of appellant, supplying her with the opportunity to confront him to find out what happened, securing her agreement that she would turn over everything discovered by her questioning of her boyfriend to the police, i.e., she would let them listen, and their

standing by listening with approval as she put pressure on Mr. Lowe to confess. There is no other reasonable conclusion here but that the police intentionally created circumstances likely to elicit an incriminating response and Lowe's resulting incriminating statements were foreseeable and not the result of luck, happenstance or accident.

iv. Reinitiation of interrogation.

Appellee maintains that Mr. Lowe initiated further conversation about the murder. Appellant's position here is that he invited Kerby into the room but that Kerby was the first to mention the subject of further conversation between appellant and the police. Obviously, a direct quotation from the record is necessary to settle this dispute:

> P[atty White]: Here they come.
>
> RL[owe]: (Inaudible)
>
> P: I want to believe you.
>
> SK[erby]: okay, that's as long as I can give you. Sorry.
>
> RL: Hey, come inside, man.
>
> SK: Okay, you sit around over there. Go ahead and sit down and let her..let her out, because I've got to let her out of here.
>
> RL: Well, I want to ...
>
> SK[erby]: Well, <u>I'll come talk to you</u>.
>
> RL: But I want her to stay while we..while I talk to you. If that's all right, please.
>
> SK: Okay, but you can't say anything.

(R-1816) (Emphasis appellant's).

v. The renewed interrogation.

Appellee's only response is that Kerby's remarks after appellant's request for counsel were "gratuitous," the "frustration level between the two men was escalating" so under these circumstances, Kerby's statements of "I'm not harding timing you" and "I'm just trying to give you a chance" after appellant requested counsel were "not intended to coerce appellant to change his mind." (Appellee's brief 33 and 34).

Appellee concedes the correct standard of whether police actions or words are designed to elicit an incriminating response does not address the officer's intent but rather the suspect's perceptions. Yet, no where does appellee examine what the effect would be on a suspect who just invoked his right to counsel for the police to immediately "remind" the suspect that his last and only chance is slipping away. Perhaps appellee did not respond to or answer the citation of Collazo v. Estelle, 940 F.2d 411 (9th Cir. 1991), which is on point, here because appellee has no response.

The state asks this Court to employ an overwhelming evidence[6]

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[6] Appellee cites Pericola v. State, 499 So. 2d 864 (Fla. 1st DCA 1986), where application of the overwhelming evidence standard found the admission of an illegally seized firearm harmless. There the victim identified the defendant as his assailant, observed the defendant with a gun and the ballistic's expert identified the type of gun used from shell casings from the scene and bullets removed from the victim. This is hardly analogous to the present case which involved improper admission of the defendant's confession. Unlike the gun in Pericola, a defendant's confession is "probably the most probative and damaging evidence that can be admitted against him. " Cruz v. New York, 481 U.S. 188,195, 107 S. Ct 1714, 1720, 95 L. Ed 2d 162 (1987) (White, J. dissenting), so damaging that a jury should not be expected to ignore it even if told to do so, Bruton v. United States, 391 U.S. 123,140, 88 S. Ct. 1620,1630, 20 L. Ed. 2d 476 (1968) (White, J. dissenting) and because in any event it is impossible to know what credit and weight the jury gave to the confession. Cf. Payne v. Arkansas, 356 U.S. 560, 78 S. Ct.

standard to determine that the admission of appellant's coerced confession was harmless, contrary to State v. DiGuilio, 491 So. 2d 1129 (Fla. 1986) and Arizona v. Fulminate, 111 S. Ct. 1246 (1991), which hold that harmless error analysis is not an overwhelming evidence test. In Arizona v. Fulminate, the Supreme Court changed the well established rule that coerced confessions were not subject to the harmless error rule. Yet, the Court reversed the Arizona Supreme Court's determination that the admission of Fulminate's first confession was harmless error. The Arizona court had reasoned that the evidence was overwhelming because Fulminate made a second confession to another individual, and "if there had not been a first confession, the jury would still have had the same basic evidence to convict." Fulminate v. State, 161 Ariz. 237, 778 P. 2d 602,611 (1988). The Supreme Court severely criticized the Arizona court's harmless error analysis and concluded that the state failed to meet its burden of establishing, beyond a reasonable doubt, that the admission of Fulminate's first confession was harmless error. In Fulminate, the court analyzed the effect of the first confession on the other evidence and concluded its admission was harmful. A harmless error inquiry is "not whether, in a trial that occurred without the error, a guilty verdict would surely have been rendered, but whether the guilty verdict actually rendered in this trial was surely unattributable to the error. That must be so, because to hypothesize a guilty verdict that was never in fact rendered-no matter how inescapable the findings to support that

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844, 2 L. Ed. 2d 975 (1958) (axiomatic rule that coerced confession cannot be harmless, overruled by Arizona v. Fulminate, 111 S. Ct. 1247 (1991)).

verdict might be-would violate the jury-trial guarantee." Sullivan v. Louisiana, 113 S. Ct. 2078,2081-82 (1993) (emphasis in original).

There is no question that the admission of appellant's taped statements had some effect upon the guilty verdict. Conceding that it at least had some effect, appellee asserts that the conviction "did not rest in any great degree on Appellant's taped statements." (Appellee's answer p. 40). Where it is not possible to say with certainty that an error had no effect whatsoever on the jury verdict, then reversal is required. Young v. State, 591 So. 2d 651 (Fla. 1st DCA 1991).

The jury's assessment of the other evidence in Mr. Lowe's case could easily have depended on the presence of the appellants' taped and involuntary statements. The admission of the coerced confession led to the admission of other evidence prejudicial to appellant. Absent the confession, the two taped video re-enactment's timing (and disproving) the route appellant said he took to leave work, pick up his cohorts and return to his place of employment after the Nu-Pak robbery have been inadmissible. (Those videos also contain extremely prejudicial reenactments of how the murder occurred). Without appellant's illegally obtained statements there would have been no basis for the jury instruction commenting on the evidence, that inconsistent exculpatory statements show a consciousness of guilt. (see Point VIII). Nor has the state demonstrated, given the state's reliance on the appellant's inadmissible statements in closing arguments to convince the jury of appellant's guilt that the statements in question contributed

nothing towards the conviction. Delgado v. State, 573 So. 2d 83 (Fla. 2d DCA 1990). (Prosecutor's reference to improperly admitted evidence in closing compounds error and contributes to finding of harmfulness). Later in its brief, appellee admits that the taped statements of Mr. Lowe were the primary means by which the state proved his guilt: "When read in toto, the State's closing argument focuses on Appellant's numerous inconsistent statements." Appellee's answer p. 64.

Because harmless-error review looks to the basis on which "the jury actually rested its verdict," Yates v. Evatt, 500 U.S. ____, 111 S. Ct. 1884,1893 (1991), and because there is no doubt that the state relied significantly on the coerced confession to obtain this conviction, the state has failed to show beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained, so reversal for a new trial is now required.

POINT II

FUNDAMENTAL ERROR UNDERMINED THE FAIRNESS OF MR. LOWE'S TRIAL WHEN THE COURT PERMITTED THE JURY TO HEAR KERBY'S INFLAMMATORY AND PREJUDICIAL STATEMENTS DURING TAPE ONE OF THE INTERROGATION OF LOWE.

Appellee dwells on appellant's failure to object to the contents of the taped interview and never addresses the merits of the issue presented. No where does the state answer why appellant was denied his right to a fair trial when the state played the tape containing the officer's scurrilous character attacks on Mr. Lowe. Appellee advances only a harmless error claim, "he's guilty, so nothing else matters." The state overlooks that all it's evidence, but the fingerprint, requires reliance on Blackmon's shaky credibi-

lity to incriminate appellant and the fingerprint was found on an item in a public place where Mr. Lowe was present within a few days preceding the robbery/murder.

Given the nature of the error which despoiled appellant's character and grievously harmed appellant's presumption of innocence, the interests of justice present compelling demand for the application of the principle regarding fundamental error.

POINT III

THE TRIAL COURT ERRED IN ADMITTING STATE'S EXHIBIT 32, THE ENTIRE CONTENTS OF A BOX OF LOWE'S PERSONAL ITEMS, WHICH INCLUDED HIS PSI FROM HIS PRIOR ROBBERY CONVICTION AND LETTERS WRITTEN TO LOWE IN PRISON.

Here the state pushes the contemporary objection rule to a ridiculous extreme to invent a "gotcha maneuver" to foil the defendant's receiving full and fair review of his murder conviction and death sentence. In appellee's conception of the law, any defense objection is never enough. Appellee faults appellant's proper objection in the trial court on relevancy grounds because appellant did not also object on prejudice, i.e., harmful error grounds. Prejudice is an appellate standard which must be met under the harmless error statute before a new criminal trial may be ordered on appeal. Section 924.33. Salvatore v. State, 366 So. 2d 745 (Fla. 1978). In order to be a ground for reversal an error in the rejection or admission of testimony must be shown to have been prejudicial to the defendant. State v. Wadsworth, 210 So. 2d 4 (Fla. 1968) (giving early history of the harmless error statute).

Whether evidentiary error is harmful or not should not enter into the trial judge's ruling on an evidentiary objection. See

Molina v. State, 447 So. 2d 253 (Fla. 3rd DCA 1983), where the court severely admonished a prosecutor for urging the trial judge to admit hearsay testimony since other evidence of the defendant's inculpatory statement would render the court's hearsay ruling harmless on appeal.

Appellee's belief that the contemporaneous objection rule requires inclusion of an argument at trial of why the objection, if overruled, will result in prejudice, i.e., be found harmful on appeal, is absurd. No trial judge should be permitted to weigh the harmless error standard in ruling on an evidentiary objection. The judge must rule on the law as it is presented and not decide whether it might be permissible to disobey the law, and overrule the objection since the error might be found harmless on appeal. In Handley v. State, 178 So. 2d 748,753 (Fla. 1936), Judge Davis, in dissent to the original affirmance, but where the murder conviction was later reversed on rehearing due to improper admission of hearsay evidence stated:

> It [harmless error rule] was never intended to invite the trial judges of this state to speculate upon the probable harmless effect of erroneous procedure as being nonreversible and thereupon countenance the admission of illegal evidence in criminal trials so long as he may feel confident that the general merits of the particular prosecution will impel an appellate court to affirm a conviction on the evidence alone, regardless of whether the trial was properly conducted or not.

The state agrees that the box of evidence was used by the jury but says this Court must assume that it was only used for "its intended purpose." (Appellee brief p. 42). Since the box contained evidence of appellant's commission of another robbery, a collateral

offense, then such evidence is presumptively harmful. Czubak v. State, 570 So. 2d 925 (Fla. 1990). Appellee has failed its burden to prove the error was harmless beyond a reasonable doubt and reversal is now required.

POINT IV

MR. LOWE'S RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL AND TO EQUAL PROTECTION OF THE LAWS WERE VIOLATED BY THE TRIAL COURT'S REFUSAL TO APPOINT CO-COUNSEL TO ASSIST MR. LONG.

Appellee agrees that the trial judge had the authority to appoint co-counsel but states that the availability of co-counsel is discretionary with the trial judge. Appellee makes no attempt to advance a reasonable basis for the court's ruling here so that the court's refusal to appoint needed and requested co-counsel cannot be viewed as anything other than an arbitrary decision.

Defense counsel's timing here cannot be faulted as in Stewart v. State, 558 So. 2d 416 (Fla. 1990), for Stewart's attorney waited until after the guilty verdict before requesting co-counsel for the penalty phase. In stark contrast to Stewart, here, Mr. Long's first motion after his court appointment in this capital case was to request co-counsel by the instant motion (R-1718-1719).

Appellee does not answer the equal protection argument. That argument is strengthened by this Court's recent decision in Green v. State, 18 Fla. L. Weekly S325 (Fla. June 10, 1993), where this Court ordered Hillsborough County to reimburse Green's special public defender appointed for purposes of direct appeal to the Supreme Court of Florida for seeking certiorari review in the United States Supreme Court after denial of Mr. Green's direct appeal. Noting that special counsel was appointed after the Public

Defender, 10th Judicial Circuit, withdrew from representing Mr. Green on direct appeal due to work overload and that the Public Defender, 10th Circuit, always sought certiorari review for each death sentenced client after affirmance in the Supreme Court of Florida, this Court said:

> To deny Green's appointed counsel's request for compensation for representing Green in this circumstance, where Green's counsel would have petitioned the United States Supreme Court had Green been represented by the public defender's office, injects a level of arbitrariness that undermines the equal protection of the laws and equal access to the courts guaranteed by article I, sections 2 and 21, of the Florida Constitution. See Graham v. State, 372 So. 2d 1363 (Fla. 1979).

The same reasoning applies here. The standards for competent defense representation, cited in appellant's initial brief, require co-counsel be appointed in a capital case. Mr. Lowe had two attorneys representing him while he was represented by the public defender's office because that office has a policy of always assigning two attorneys on each capital case but the court denied his court appointed lawyer's timely request for co-counsel. Such an inequity, given that Mr. Long really did need the help, denied Mr. Lowe his constitutional guarantees to equal protection of the law.

POINT V

THE TRIAL COURT ERRED IN FAILING TO CONDUCT AN INQUIRY INTO COUNSEL'S EFFECTIVENESS WHEN APPELLANT MOVED TO DISCHARGE HIS COURT-APPOINTED COUNSEL.

Appellee initially professes inadequacy of Mr. Lowe's complaint but eventually agrees that appellant's complaint was that Long was not doing anything on the case (Appellee's brief p. 49)

and that this claim was refuted. However, instead of making an inquiry of Mr. Long to determine that he was doing something or nothing, appellee states that the trial court refuted appellant's claim by "the trial court's own personal knowledge." (Appellee's brief p. 49). Instead of asking Mr. Long if he was doing work on the case, the trial judge, from his own "personal knowledge" told Mr. Lowe what Long was doing:

> THE COURT: ..you can't see him doing it so you don't think he's doing any work.
>
> MR. LOWE: (Indiscernible)
>
> THE COURT: But apparently he is. I mean he's filing motions. He's prepared for the Motion to Suppress Hearing. He's looked--over the depositions. He's ready to subpoena witnesses. Only way he can do that is if he's looked over the whole case file. Now, you know, you sit down and you need to discuss your case fully with Mr. Long and then Mr.--you know, Mr. Long knows the legal reasons I mean for, you know, why you could not continue to be representing him and if those things come up he'll tell you about them.

(R-219-220).

The record does not reveal where the trial judge derived this "personal knowledge." Mr. Long had filed no motions by this point, March 6, 1991, (or anytime thereafter) but for the motion for appointment of co-counsel, requesting help from another lawyer (R-1719). The motion to suppress statements was filed by predecessor counsel, the Public Defender's office (R-1620-1624).

In the only conversation of record between Long and the trial judge after Long's appointment but before the above quoted exchange where the judge informed Mr. Lowe of what Mr. Long was doing, Long said he could be prepared for trial in April, wanted a date certain

for trial so witnesses could be subpoenaed and told the judge that a hearing was necessary on the pending motion to suppress statements (R-198). Mr. Long then proceeded to argue the motion for co-counsel immediately before Mr. Lowe complained that Long was doing nothing on his case. Never did Long claim on the record that he had done any preparation or work on appellant's case or say that he had reviewed the depositions on appellant's case (much less initiated an independent investigation) at the time that appellant claimed his lawyer had done nothing for him.

Therefore, the trial judge's acquisition of personal knowledge by which he denied appellant's complaint against Mr. Long and request for another attorney must have come from a source outside the courtroom. Denying appellant's request on the basis of information acquired in appellant's absence violates appellant's rights to due process of law.

In a capital case, the trial judge may not take evidence to find out information about the case at a hearing where the defendant is not present. Proffitt v. Wainwright, 685 F.2d 1227, 1257 (11th Cir. 1982). Nor may the judge receive a report which contains information not disclosed to the defendant. Gardner v. Florida, 430 U.S. 349, 97 S. Ct. 1197, 51 L. Ed. 2d 393 (1977) (prohibits use of "secret information" in capital case). In reaching the decision in Gardner, the Court emphasized the unacceptability of the "risk that some information accepted in confidence may be erroneous, or may be misinterpreted by the ...judge." Id. at 359, 97 S. Ct. at 1205. Further, this Court has soundly condemned the practice of a trial judge's receipt of information in

a capital case by way of an ex parte conversation or consultation with one of the party's lawyer. Rose v. State, 601 So. 2d 1181 (Fla. 1992), Spencer v. State, 615 So. 2d 688 (Fla. 1993).

Thus Mr. Lowe's complaint could not be refuted by the trial judge's "personal knowledge" acquired in some non-record hearing or communication and appellee's suggestion to the contrary violates appellant's federal rights to due process and a reliable penalty determination under the 5th, 8th and 14th Amendments to the United States Constitution.

Further, the trial judge's telling Mr. Lowe that Long knew the law and Long would be responsible for determining when Long would be unable to represent Lowe was a total abdication of the court's responsibility to determine whether counsel was rendering effective assistance of counsel as required by Nelson v. State, 274 So. 2d 256 (Fla. 4th DCA 1973) and Hardwick v. State, 521 So. 2d 1071 (Fla. 1988).

Finally, the state claims harmless error for the trial court's inadequate Nelson inquiry, citing Kott v. State, 518 So. 2d 957 (Fla. 1st DCA 1988), Sweet v. State, 18 Fla. L. Weekly S447 (Fla. August 5, 1993), Boynton v. State, 577 So. 2d 692 (Fla. 3rd DCA 1991) and Parker v. State, 570 So. 2d 1053 (Fla. 1st DCA 1991). Sweet involves a Faretta[7]. The counsel Sweet wanted discharged was replaced; Sweet was satisfied with his new counsel and the reason he wanted to represent himself, to go to trial immediately without

[7] Faretta v. California, 422 U.S. 806, 95 S. Ct. 2525, 45 L. Ed. 2d 562 (1975).

a continuance, dissipated.[8]

The other district court cases cited by appellee contain a requirement that the defendant must make some additional attempt to dismiss defense counsel or renew his request to discharge counsel. This additional requirement that a defendant must argue with the court's ruling and risk contempt to preserve his claim for appeal is unfair. See Gregg v. State, 18 Fla. L. Weekly D2122 (Fla. 5th DCA October 1, 1993), where a pro se defendant was (wrongfully) held in contempt for attempting to be heard at his resentencing after the trial court ruled against him. Nor has this Court ever adopted such a requirement - to continue to object and argue with the court's ruling - for a defendant to preserve his right to a Nelson inquiry.

Kott, Boynton and Parker contain an additional element for the finding of harmless error which is not present here, a deter-

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[8] Sweet cites to this Court's decision in Scull v. State, 533 So. 2d 1137 (Fla. 1988), where the trial judge cut off the defendant and never let him explain his complaints against his court appointed counsel, Michael Van Zamft. This Court found the failure to conduct an adequate Nelson inquiry was mooted by the defendant's later expressions of satisfaction with his attorney. There the reasons for requesting removal of this attorney dissipated as the trial progressed. Scull's apparently volunteered remarks, "I am proud of this attorney," "I am very happy about the way he defended me," the "defense could not have been done better," and "I want Mr. Van Zamft to represent me as many times as possible in front of the court" are of an entirely different nature than what occurred here. The state orchestrated the opportunity to question Mr. Lowe's satisfaction with Long's representation at the close of the evidence, without anyone advising Lowe of the ramifications of such a question or what a truly effective lawyer might have done with the evidence in this case. Nor did anyone advise Lowe that he did not have to answer that question, which might effect important rights. In these circumstances, Long's assent to the question did not moot or waive this issue. See Martin v. Rose, 744 F.2d 1245 (6th Cir. 1984). Nor did Mr. Lowe express genuine and complete satisfaction with Long as Sweet did over Van Zamft.

mination that the record reveals the incompetency alleged was not so great as to prevent an adequate defense, Kott. In Boynton the failure to conduct an adequate Nelson inquiry was mooted and rendered harmless because a "vigorous and partially successful defense was mounted at trial." In Parker, the eyewitness evidence was indeed overwhelming (see co-defendant, brother's case reciting the facts, Parker v. State, 570 So. 2d 1048 (Fla. 1st DCA 1991)), and the record revealed no incompetency of counsel.

Here, even a cursory examination of the record raises serious doubts of the competency of counsel. The record discloses sufficient reason that should have caused the court to inquire further into the defense attorney's preparation:

-Long filed no motions but a request for co-counsel.

-He conducted NO voir dire examination of the jury (SR-VD-870).

-Failed to conduct a vigorous cross-examination of Dwayne Blackmon:

did not cross-examine on Blackmon's probationary status and motive to lie;

did not cross-examine on Blackmon's October 26 affidavit, though the need for crucial cross-examination on the affidavit was the sole reason the public defender was disqualified. At the disqualification hearing the trial judge said, "I don't--I don't see how you could not use the Affidavit if he [Dwayne Blackmon] takes the stand" (SR-VD-196);

-failed to cross-examine on the bad feelings and fights between the Blackmons and Lowe;

-defense objections during Ms. White's direct prevented the jury from hearing why she might have been a suspect (R-858) and why there were bad feelings and a fight between Lowe and the Blackmons (R-860).

-He refused to argue for a verdict of not guilty (R-1050-1061,1106-1115,1286).

-He failed to present mitigation showing defendant was under the substantial domination and control of Patty White, who was a manipulative, cocaine addict (SR-80-85-88) (see Dwayne Blackmon's deposition, Patty took Lowe's check every week to buy cocaine for herself SR-67).

(See, defense counsel really did need help of co-counsel, Point IV, infra).

POINT X

THE TRIAL COURT ERRED IN GRANTING THE STATE'S MOTION IN LIMINE WHICH EXCLUDED DANNY BUTTS' SPONTANEOUS STATEMENT TO DONNA BROOKS THAT "TWO PEOPLES" ARGUED WITH AND SHOT HIS MOTHER.

Once again the state proposes a new "gotcha maneuver" to urge this Court to deny full and fair review of Mr. Lowe's murder conviction and death sentence. In the trial court, when Mr. Lowe's second appointed attorney asked if the state's motion in limine had already been heard, the prosecutor assured Mr. Long that predecessor counsel had thoroughly argued the motion (R-402). In contravention to its position in the trial court, the state now argues that the issue is not preserved, that Mr. Long was offered an opportunity to present additional argument but declined to do so (Appellee's brief p. 70). Appellee's statement is a total misrepresentation of what occurred below. The issue was discussed

with Mr. Long but he in no way "declined to offer additional argument," rather, the prosecutor assured him it was fully argued and no further hearing was necessary. This Court should limit the state on appeal to arguments the state made at trial. Hayes v. State, 581 So. 2d 121,124 (Fla. 1991), Cf. T.S. v. State, 18 Fla. L. Weekly D1905 (Fla. 2d DCA August 27, 1993) (defendant didn't fail to preserve erroneous application of special hearsay exception where the state never proffered statement under that hearsay exception), United States v. Lugo, 978 F.2d 631,637 (10th Cir. 1992) (appellate court can only deal with theories and evidence advanced below; government cannot argue theory for the first time on appeal).

The state then argues this issue is not preserved through reference to case law concerning how a defendant must preserve the denial of a defendant's motion in limine, when evidence that the defendant wants excluded is introduced at trial. Even though the state acknowledges that its cases pertain to the opposite situation, the state doesn't explain why the opposite rule should be applicable here, where the state has wrongfully convicted the trial court to exclude defense evidence and does not even claim the basis for the exclusion was correct. The state argues that Bender v. State, 472 So. 2d 1370 (Fla. 3rd DCA 1985) only prohibits the defendant from attempting to elicit excluded evidence and that the defendant should still have to at least "pose an objection to the testimony's exclusion at the time its admission would be appropriate." (Appellee's answer at p. 71). However, Bender itself deals with that alternative and holds that the trial judge's ruling

granting the state's motion in limine "prevents the very proffer which the state now suggests should have been made at trial." Id. at 1373.

The cases cited by appellee regarding preservation should not pertain where the state was responsible for convincing the judge to exclude favorable defense evidence. The state does not even claim that the judge was right to exclude Danny Butt's statement to Ms. Brooks. The state has absolutely no argument to make on the merits and on appeal does not attempt to justify the completely erroneous position it presented to the trial court. The state having secured such a ruling below now proposes that the defendant must argue with the court's ruling and try to repeatedly get the trial judge to change its mind.

The state conceded on the motion in limine that the defendant wanted to cross-examine Ms. Brooks about Danny's statement and having succeeded in having such exculpatory evidence excluded, the state's argument that defendant must repeatedly object should be an unnecessary additional step for appellate presentation when the state was the proponent of the court's erroneous ruling. See Thompson v. State, 615 So. 2d 737 (Fla. 1st DCA 1993), where the court held that the defendant was not required to continuously object during the witness' testimony, which the state had advocated was necessary in addition to objecting before the witness' testimony in order to preserve the court's ruling on a motion in limine.

POINT XII

IT WAS ERROR TO INSTRUCT ON THE HEINOUSNESS AND COLDNESS AGGRAVATING CIRCUMSTANCES WHEN THE EVIDENCE DID NOT SUPPORT THEM.

Incredibly, the state argues that the heinousness and coldness circumstances might have applied but cites no cases to support their existence. The state's argument proves appellant's point; even though unsupported in the law, the facts of the child's presence and the painful gunshots might have caused the jury to rely on these unproven aggravators given the improper arguments of the state urging their adoption by the jury. Appellant maintains his arguments in his initial brief, that case law shows these two aggravators to be completely inapplicable here.

Recently in Bonifay v. State, 18 Fla. L. Weekly S464 (Fla. September 2, 1993), this Court reversed a death sentence for a new jury sentencing because the judge erroneously found the existence of the heinousness aggravator. Instead of ordering only a new sentencing before the judge, the Court also ordered a new proceeding before the jury because the Court could not determine what effect that aggravator had in the sentencing process. The Court said, "This [heinousness] factor was extensively argued to the jury, and a new jury should be empaneled to make a recommendation as to the appropriate sentence." id. at S465. Likewise, in Lawrence v. State, 614 So. 2d 1092 (Fla. 1993), this Court reversed for a new jury sentencing proceedings where similar fact evidence of other crimes was harmful in regards to the death sentence, through harmless as to the conviction.

The same is true here. The state relied extensively on these two unfounded factors, heinousness and coldness, in argument for the death penalty. Improper reliance on these factors infected the jury's fair determination of the proper penalty so a new and fair sentencing proceeding before a new jury should now be held. Clemons v. Mississippi, 494 U.S. 738, 110 S. Ct. 1441, 108 L. Ed. 2d 725 (1990).

POINT XVII

THE TRIAL COURT FAILED TO CONSIDER OR WEIGH MITIGATION.

On penalty the state accepts that there were mitigating circumstances[9], but argues that the trial court judge choose to give them no weight. The state never explains how this is possible under the law except that the trial judge has discretion to weigh the factors as he sees fit. The state entirely misses the point. It cannot concede the presence of mitigating circumstances as it has and then brush off any trial court failure to weigh those mitigating factors in sentencing appellant. "Once established a mitigating circumstance may not be given no weight at all." Dailey v. State, 594 So. 2d 254,259 (Fla. 1991).

Here the aggravators are not strong and the mitigator s are not weak. Reversal for a proper reweighing of these factors is required.

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[9] At p 66 of its answer, appellee says: "As for nonstatutory mitigation, the trial court found that Appellant functioned well in a strict environment, was a responsible employee after release from prison, had a strict home environment as a child, and participated in Bible studies after release from prison."

CONCLUSION

WHEREFORE, appellant respectfully prays that this Court grant him a new trial where his involuntary and coerced taped statement will not be used against him.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy hereof has been furnished by courier, to SARA D. BAGGETT, Assistant Attorney General, 1655 Palm Beach Lakes Boulevard, Third Floor, West Palm Beach, Florida 33401, this 21st day of OCTOBER, 1993.

Margaret Good
MARGARET GOOD
Assistant Public Defender