IN THE SUPREME COURT OF FLORIDA

ERIC A. RANDALL,

Petitioner,

vs. Case No. 80,320

STATE OF FLORIDA,

Respondent.
_____/

STATE OF FLORIDA,

Appellant,

vs. Case No. 80,358

ERIC A. RANDALL,

Appellee.
_____/

RESPONDENT'S BRIEF ON THE MERITS

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PRELIMINARY MENT

After Randall served his initial brief, the court granted his motion to consolidate. That order, dated September 25, consolidated this case and State v. Randall (case no. 80,358), which is the State's direct appeal as to Issue I herein. Since the consolidation order is for "all appellate purposes," the State will rely on its initial and reply briefs in case no. 80,358 for Issue I.

STATEMENT OF THE CASE

For clarity, the State notes that the first suppression hearing was conducted by Judge Haddock (T 1), who did not preside at trial. The second suppression hearing was held during trial before Judge Tygart. (T 91, 778-94).

The State must clarify Randall's representation that a State witness (Sanders) "personally appeared and exercised his Fifth Amendment privilege." (initial brief, p. 3). This observation gives the erroneous impression that Sanders took the stand before the jury. Although Sanders was present, his counsel announced Sanders' intention to invoke the Fifth. The jury was absent. (T 942).

STATEMENT OF THE FACTS

The State accepts Randall's statement with the following:

1. A second, in-trial suppression hearing (T 778-94) was conducted by the judge (Tygart) who presided at trial. Judge Tygart also found Randall's incriminating statement to be voluntary. (T 794).

2. Randall's first statement was given about 10:15 (T 17); and was admitted at the suppression hearing as State's Exhibit 2.[1]

3. The State objects to Randall's statement of the facts at p. 5-6, in which he recounts his testimony as if it were uncontroverted. He does not mention that the judge (Haddock), who presided over the first suppression hearing, expressly found his "entire testimony unworthy of belief." (T 85).

4. Randall, when describing the testimony of State witness Kevin Williams, overlooked Williams' direct identification of Randall as the one who shot the two other men. (T 399).

5. Another State witness, medical expert Lipkovic, testified that the deceased victim's death was caused by massive brain damage following a gunshot wound to the head. (T 737). He

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[1] The only error in timekeeping was the notation on State's Exhibit 1 (T 12), which was the Miranda rights form read to Randall. It was marked at 11:10 a.m., which the detective testified should have been 10:10 a.m.; that is, before Randall's first (exculpatory) statement. (T 13). State's Exhibit 10 was admitted into evidence after the trial was well underway. (T 815). That exhibit (Appellant's first statement) had earlier been placed into evidence during the testimony by Detective Bacher in the second suppression hearing. (T 778-94).

also stated that the body had superficial abrasions consistent with falling forward after being shot. (T 738). He testified that the shot came from at least two feet away. (T 741). His testimony indicated the general direction from which the shots came. (T 747).

6. At trial, Randall did not challenge his sentence on the ground that ch. 89-280, Laws of Florida, violates the one-subject rule in Art. III, §6 of the Florida Constitution.

SUMMARY OF THE ARGUMENT

ISSUE I: One-Subject Challenge to Ch. 89-280, Laws of Florida

A. Preservation of Substantive Issue

The State relies on the summary of Issue I in case no. 80,358; found at p. 3 of the State's initial brief in that case.

B. Merits

The State relies on the summary of Issue II in case no. 80,358; found at p. 3 of the State's initial brief in that case. If Randall must be resentenced, he is not necessarily entitled to a guidelines sentence.

ISSUE II: New Miranda Warnings

This question was not addressed in the opinion below, effectively affirming the trial court *per curiam*. It has nothing to do with the certified question. The State respectfully suggests

that the court should not exercise its authority to review this ancillary issue.

Two suppression hearings were conducted as to an incriminating statement Randall gave to a police detective. The second hearing, before the judge who presided at trial, is not contested on appeal. Randall has conceded this issue.

Randall's argument addresses only his first, pretrial suppression before a different judge. As found by that judge, the total circumstances of Randall's brief questioning establish that his second, incriminating statement was voluntary. Simply because Randall, who was given Miranda warnings before any questioning, chose to give a false statement first does not entitle him to re-advisement of his Miranda rights about 15 minutes later.

If admission of Randall's statement were error, it was harmless. Given the strength of the State's case and weakness of the defense, the incriminating statement could not have affected the outcome of the verdict.

ISSUE 111: Perjury Proceedings Against State Witness

This issue also is outside the scope of the jurisdictional question, and should not be reached. One State witness, whose sworn statement very soon after the shooting identified Randall as the murderer, simply changed his story not long before trial. He did so in a deposition in which he claimed he was lying in his first statement. The prosecutor charged him with perjury; the witness invoked the Fifth Amendment.

The prosecutor's decision to file perjury charges was made in good faith, and was not misconduct. Randall cites no authority to the contrary. Nothing in the record establishes the State's witness was even designated as a witness for the defense. Given that the witness admitted he had lied, and that he would be badly impeached however he testified; Randall's claim that he was deprived of a favorable witness becomes ridiculous. For the reasons stated in Issues II and IV, any misconduct by the prosecutor was harmless error.

ISSUE IV: Exclusion of Discovery Deposition

As yet another ancillary issue not necessary to disposition of the case, this issue should not be reached. The trial court properly excluded the deposition of the State witness who invoked the Fifth Amendment (*see*, Issue III herein), as that deposition did not meet the requirements for admission under §90.804(2), Fla. Stat. Moreover, there was indication that the deposition was obtained through Appellant's wrongdoing. If exclusion were error, that error was harmless.

ISSUE V: Admission of Testimony by Late-Located State Witness

As with Issues II through IV, this ancillary issue should not be reached. The trial court did not abuse its discretion, under the total circumstances, in refusing to exclude testimony by a disclosed State witness who could not be found until shortly before trial. Any prejudice arose through Randall's wrongdoing; that is, his attempts to persuade the witness not to be deposed,

rather than through any untimeliness by the State. For the reasons stated in Issues II - IV, any error by the trial court was harmless.

ARGUMENT

ISSUE I

WHETHER A CRIMINAL DEFENDANT'S RIGHT TO DUE PROCESS CAN BE DENIED MERELY BY THE NUMBER OF SUBJECTS IN A LEGISLATIVE ACT.

A. Preservation of the Substantive Issue

The one-subject challenge to ch. 89-280, Laws of Florida, was not raised before the trial court. It is not fundamental error. Therefore, the First District was without jurisdiction to consider the issue for the first time; and therefore without jurisdiction to certify an attendant question to this court.

The State relies on the argument in Issue I of its initial brief and reply brief in State v. Randall, case no. 80,358. The opinion below must be vacated and the trial court affirmed on this issue.

B. Merits

1. Validity of Sentence

Both components (habitual felons/career criminals and motor vehicle repossession) of ch. 89-280 relate to controlling crime. The First District must be reversed on this point and the certified question answered in the negative. The State relies on the argument in Issue II of its initial brief in State v. Randall, case no. 80,358.

2. Resentencing

Not content to attack his actual sentence, Randall prematurely and incorrectly seeks a guidelines sentence. He analogizes to guidelines departure case law, and contends that he cannot be resentenced as an habitual (nonviolent) felon, assuming the State can prove the requisite prior convictions. He is logically and legally wrong.

Logically, resentencing Randall as a nonviolent felon cannot result in a penalty as severe as his original sentence; as sentences for nonvialent habitual felons do not carry mandatory minimums. Legally, there is no justification to preclude an habitual felon sentence on remand -- the trial court would not be manufacturing new case-specific reasons, but simply citing to additional convictions. Randall's criminal history will not have changed between his first sentencing and any resentencing. *See*, King v. State, 590 So.2d 1032 (Fla. 1st DCA 1991)(when state failed to overcome hearsay objection as to documentation of appellant's release date, nothing prevents the state from presenting sufficient evidence to again classify defendant as habitual); Doggett v. State, 584 So.2d 116 (Fla. 1st DCA 1991)(double jeopardy does not prevent resentencing a defendant as habitual, when first habitual felon sentence relied upon nonsequential convictions). Randall's argument to the contrary is simply wishful thinking. Moreover, until he has actually been resentenced as an habitual felon, there is no reason for the court to rule on this issue. Randall's argument is also premature.

ISSUE II

WHETHER A SUSPECT MUST RECEIVE NEW MIRANDA WARNINGS AFTER EVERY SHORT BREAK IN QUESTIONING

A. Jurisdictional Considerations

This issue is far outside the scope of the certified question, and **not** necessary to disposition of the case once the certified question is answered. The State respectfully suggests that the court decline to exercise its authority to review this ancillary issue. *See*, Ross v. State, **17** F.L.W. S367, **368** (Fla. June 18, 1992)(declining to review several issues **that** were "beyond the scope of the issue for which jurisdiction lies").

B. Merits

In a nutshell, Randall maintains that new Miranda warnings **are required every time there is** a break in questioning, and the police ask a subject if he or she is telling the truth. No authority is cited that would declare these events to be **such** a serious change of circumstances as to require **re-advisement** of Miranda rights.

Before responding on the merits, the State must point out that Randall actually received two suppression hearings. The first was before Judge Haddock and is discussed herein; the second was before Judge Tygart. In the latter, essentially the same evidence was elicited. (T **778-91**). Judge Tygart, who presided at trial, also found Randall's statement voluntary and admissible. (T 794).

Randall does not contest the second hearing. Therefore, he has conceded this issue. Randall also **concedes** that Miranda warnings were given before the first statement, as he now argues only that new warnings were required due to "drastically" or "vastly" changed circumstances. In this light, the trial court's verbal findings and observations looms large:

> THE COURT: Okay.
>
> Well, I don't know of anything in any appellate decisions or in any United States court that makes a statement inadmissible because a police officer pointed his finger or told you in the interview he thought his statement was untrue. I can't think of why any police officer that was going to violate the law in the way that Mr. Randall's testimony would have us believe he did, if a **police** officer set out to conspire to do this to someone, why would he not just put the same time on all three forms would be beyond me. But why would you conspire to violate someone's rights like that and then put the incorrect times? It makes no sense at all. And, by the same token, if you are -- if Mr. Randall was merely writing down what the officer told him, I find it very difficult to believe he would embroider all these extra details into what he was writing. (T **84-5**).

In short, the trial court heard testimony as to the circumstances under which the statements **were** obtained, and -- in light of Randall's unworthiness of belief (T 85) -- found the statements to be voluntary.

Randall ignores the legal principles applied to review of suppression orders. Trial court orders on suppression are presumptively correct, and the reviewing court must interpret the evidence and reasonable inferences most in favor of sustaining such orders. Owens **v.** State, 560 So.2d 207, 211 (Fla. 1990), *cert.*

denied, 112 L.Ed.2d 118 (1990). *See,* Caso v. State, 524 So.2d 422 (Fla. 1988)(trial court's finding as to whether suspect in custody presumptively correct and would not be overturned if supported by substantial and competent evidence).

Defense counsel tersely presented, in the alternative, the argument that re-advisement of Miranda rights was required. (T 32). Therefore, the issue is preserved. In light of this, it must be assumed that the trial court did not find a change in circumstances requiring a re-advisement. There is competent and substantial factual evidence ta support this conclusion. First, Randall went to the police voluntarily, albeit in response to a card left by the police detective. (T 30, 42-8). He arrived about 10:00 a.m. (T 42), and apparently was escorted to an interview room promptly. (T 10-11). The detective gave Randall his Miranda warnings a few minutes later (T 14), and immediately upon seeing him in the "homicide office." (T 10-13).

Randall was alone (T 14), but questioned only by Detective Bachert. He was not handcuffed. He acknowledged that his second statement was given about 10:30 a.m. (T 49), although he claimed his Miranda rights were not given until 11:10 a.m. (T 49).

Therefore, even under Randall's version, he was questioned not more than an hour by only one detective, and was not handcuffed. After obtaining Randall's first statement, the detective told Randall he was lying, as a statement had already been obtained from Darryl Cummings (Randall's friend). That statement attributed the shooting to Randall. (T 37).

Randall was then told he was under arrest for murder. He gave his second statement. (T 38-9). Significantly, the detective testified that he did not curse Randall, and particularly did not tell Randall to write down "what really happened." (T 39-40).

Therefore, the only changes in circumstances are the facts that Randall was told he was lying (based on his friend's statement), and that he was under arrest for murder. This was only about 15 minutes after the first statement was given (T 37); itself only a brief time after the Miranda warnings. Randall's claim, that interrogation "effectively began anew" (initial brief, p. 21), is factually and legally incorrect.

Restated, Randall would benefit from his own wrongdoing. He was given Miranda warnings before any questioning began. Suppose, however that Randall were immediately arrested for murder; given Miranda warnings; told of his friend's statement; and directed to tell the truth. Randall's confession would not have been tainted. Instead, and in a brief time, Randall gave a false statement followed by a "confession." Through the intervening event of his own false statement, Randall would create the right to new Miranda warnings, when no such right existed had he told the truth from the start.

Although a habeas proceeding, Ballard v. Johnson, 821 F.2d 568 (11th Cir. 1987), is instructive. Ballard voluntarily went to a police station to inquire about discovery of the victim's body. He was questioned for 20 minutes, then again for 30 more minutes by the victim's uncle. During the second questioning, Ballard confessed; then he confessed a second time. *Id.* at 569.

All police officers testified that Ballard received Miranda warnings and executed a waiver before any questioning, although the waiver was dated at a time after the confessions. Ballard was transported to the sheriff's office in another town, and -- in the evening, about 4 hours after his initial confession -- confessed for a third time before four officers. *Id.* at 570.

Ballard claimed that he should have been "readvised of his Miranda rights during the evening interrogation." *Id.* at 571. Rejecting this point readily, the court found that the only break in his questioning was the trip from the police station to the sheriff's office.

Here, there was no break in questioning, other than a very brief lapse which the detective made a copy of the statement by Randall's friend. (T 20). Ballard involved repeated confessions, the last one before four people several hours after the first two confessions. Here, there was one written confession, about 15 minutes after the first.

Randall does not contend the detective's statement that Randall was lying, or that the detective's revelation that Randall's friend had named him as the murderer, are of themselves improper. Consequently, his complaint is really no more than his wishful thinking; that whenever questioning -- after a voluntary waiver of Mkranda warnings -- becomes more focused or intense, new warnings are required. This is not true. *See,* Martin v. Wainwright, 770 F.2d 918, 929-31 (11th Cir. 1985)(seven day lapse between initial Miranda warnings and defendant-initiated waiver and

confession is not require "needlessly repetitious," complete Miranda warnings).

Randall does not claim, and nothing in the record reveals, any signs of promises or inducements, or physical coercion. Randall never asked that questioning stop, or that he be allowed to contact a lawyer. Aware that Randall was lying, the detective told Randall as much and revealed the friend's statement. The friend's statement was not a ruse.

No claim is made that the police ever gave false information to Randall. He does not claim that he did not understand his Miranda rights. He does not, and could not, claim any improper interrogation techniques or inducements were used. His confession was voluntary, and was not tainted by the lack of new Miranda warnings a few minutes after those warnings were first given. *See*, State v. Moore, 530 So.2d 349 (Fla. 2d DCA 1988) (confession voluntary when suspect understood and waived his Miranda rights, despite the fact that police misrepresented the nature and amount of evidence against defendant), *relying upon*, Frazier v. Cupp, 394 U.S. 731, 89 S.Ct. 1420, 22 L.Ed.2d 684 (1969)(murder confession voluntary despite fact one suspect was told his partner had confessed).

After receiving Miranda warnings, Randall was questioned for one-half an hour by completely proper, non-coercive methods. Simply because the police detective did not lay all his cards on the table at the outset does not require re-advisement of Miranda rights every 15 minutes. Randall's position would force police to

reveal everything they know up front, thereby perhaps stunning a suspect otherwise willing to talk into silence. Moreover, it would create a right to re-advisement when the police reveal information in response to a suspect's false statement. Not often, one would assume, does a murderer so boldly claim the benefit of his own wrongdoing. Randall's argument must be rejected.

On page 27 of his initial brief, Randall claims impropriety in the fact that he was not told he was under arrest until after his first statement, allegedly in violation of §901.17, Fla. Stat. This point is not preserved, as it was not raised in the First District or before the trial court. Randall would have this court construe and apply §901.17 for the very first time in this case.

Randall went to the police station voluntarily, was escorted to an interrogation room and given Miranda warnings before his first statement., Randall attempted to exculpate himself by lying. His belated claim that he should have been told he was under arrest -- tenuously supported by the testimony from the detective that Randall was not free to leave -- is ridiculous. Randall obviously intended to lie his way out; his point is pure speculation.

The only authority cited by Randall is State v. Madruga-Jimenez, 485 So.2d 462, 465 (Fla. 3d DCA), *rev. denied,* 492 So.2d 1335 (Fla. 1986). There, the police were held to have violated §901.16, Fla. Stat., which addresses arrests made upon a warrant. Here, no warrant had been issued; Randall was voluntarily at the station.

Madruga also involved substantial violations of Miranda, including the failure to give the warnings before asking questions "likely to elicit incriminating responses." *Id.* at 465. Nothing of that sort is present here. Nothing in Madruga indicates a failure to tell a person he or she is under arrest -- when that person has received Miranda warnings -- is of itself reversible error. Also, Madruga involved a lapse of 1½ hours between initial questioning and notice of arrest. *Id.* at 463, n. 1. Here, only a few minutes passed -- during which Randall gave a false exculpatory statement. Nothing in the record or in Madruga supports this non-preserved point.

Finally, if it were error to admit Randall's statement, that error was harmless. In the statement (T 820-1), Randall admits to the shootings, but intimates self-defense. In contrast, four State witnesses testified that Randall ran up and shot the two victims. *See* the testimony of Pugh, Williams, Cosby, and Cummings, (T 351-2, 404-5, 456-7, 614; respectively). The State's medical expert testified that the deceased victim was killed as result of a gunshot to the head and resultant brain injury. He opined that the shooting was a homicide. (T 737). Other superficial injuries were consistent with falling after being shot. (T 738). The expert also testified as to the general direction that the fatal shots entered the victim, in manner indicating they were fired by someone approaching as Randall did (T 743-7), and that the shots were fired from at least two feet away. (T 741). This testimony strongly corroborates that of the eyewitnesses.

In contrast, the defense presented two witnesses who admitted they were not present at the crime scene when the shootings occurred. (T 921-2, 938). The third defense witness equivocated on her most important testimony (T 990-1), and was badly impeached with her own deposition. (T 984-88).

Comparing the State's very strong case against the defense's negligible case, the admission of Randall's incriminating statement could not have affected the outcome of the verdict. Its admission, if error, was harmless. State v. DiGuilio, 491 So.2d 1129 (Fla. 1986); Arizona v. Fulminate, 113 L.Ed.2d 302 (1991).

ISSUE III

WHETHER CHARGING A STATE WITNESS WITH PERJURY ABRIDGED RANDALL'S CONSTITUTIONAL RIGHTS

For the reasons set forth in part A of Issue 11, this court should decline to reach this issue. Otherwise, a State witness who commits perjury through later statements that are somewhat exculpatory is not transformed into a defense witness. Randall's alchemy is not persuasive.

Rasheed Sanders gave a sworn statement the morning after the murder. (Def. Ex. i, p. 1, 20).[2] Before he did so, the prosecutor warned him that he was under oath and could be subject to perjury charges if he did not tell the truth. (Def. Ex. i, p.

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[2] Defense Exhibit i was placed into the record on appeal by the First District's order of September 23, 1991. Defense Exhibit i is Sanders' April 28, 1990, statement, and will be cited as such. Sanders' Jan. 29, 1991, deposition is cited as Defense Exhibit G.

20). Sanders then declared that Randall and two others asked him for a gun to "take care of some business." (Def. Ex. i, p. 21). Sanders then accompanied the others to obtain guns, and then on to a club. (Def. Ex. i, p. 21-6). At the club, a confrontation occurred; Sanders anticipated a fight and began to turn away. (Def. Ex. i, p. 26-8).

Sanders then saw Randall run up to the "fight," and start shooting. (Def. Ex. i, p. 28,31-2). The only other sho s Sanders heard were those fired by an off-duty policeman working as a security guard. (Def. Ex. i, p. 34).

Sanders was deposed on January 29, 1991 (Def. Ex. G), about nine months later. At the start of that deposition, he was again warned that he was under oath, as before, and still subject to the penalty of perjury. (Def. Ex. E, p. 4-5). The prosecutor also made it clear that there was to be no discussion of Sanders' pending burglary charge. (Def. Ex. G, p. 5).

Randall's counsel began by referring to Sanders' earlier statement. (Def. Ex. G, p. 7). Nevertheless, Sanders stated when he first saw him, Randall did not have a gun. As he returned to his car, Sanders overheard an argument, and noticed Randall was watching it. (Def. Ex. G, p. 12-4). Sanders then stated that Randall turned to walk away; and, as he did so, the shooting started. Since it was dark, Sanders could not see who did the shooting. (Def. Ex. G, p. 14, 33). Nevertheless, Sanders saw two guys fall before everybody, including Randall, started running. (Def. Ex. G, p. 15-7). Sanders got inside the car, which was

driven away by another person. As they drove away, shots were fired by an off-duty policeman. (Def. Ex. G, p. 15).

Sanders also claimed that one of his companions said to blame the shooting on Randall. (Def. Ex. G, p. 19-21). Sanders took this as a threat. (Def. Ex. G, p. 21 . He also claimed that his friend (Dewayne Cosby) threatened to kill him if Sanders told the police that Cosby did the shooting. Sanders then stated that Randall was walking away, so that he could not see how Randall could have done the shooting. (Def. Ex. G, p. 33). Finally, Sanders expressly admitted his earlier statement was a lie. (Def. Ex. G, p. 34).

Based on Sanders' admission of lying, the prosecutor charged him with perjury.[3] (T 944). After tria began, Sanders invoked the Fifth Amendment through counsel (representing Sanders on an unrelated charge). (T 942).

Randall's entire argument is based on three erroneous assumptions. First, he assumes Sanders became a defense witness upon giving the later deposition, which was exculpatory through its inconsistency with his prior sworn statement. Second, he assumes the prosecutor's filing of perjury charges deprived him of a favorable witness. Third, he assumes the filing of perjury charges

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[3] The prosecutor stated such before the court. At this point, Randall's initial brief (p. 29) cites several times to documents from the record in the First District's case of Sanders v. State, (case no. 91-01754), which is obviously non-record material in this case. While Randall correctly notes that judicial notice is possible, he has never requested this court to take such notice, or given written notice to the State, as required by 890.203, Fla. Stat.

amounts to prosecutorial misconduct. All of these assumptions are factually and legally incorrect.

Initially, Sanders was never listed as a defense witness; although he gave his deposition on January 29, 1991 -- five weeks before trial began. Counsel's claim that Sanders was listed as a defense witness (T 945) is nowhere in the record. It is Randall's obligation to bring forward a record establishing the error alleged. *See*, Applegate **v.** Barnett Bank, 377 So.2d 1150 (Fla. 1980)(when obligated party fails to bring forward record demonstrating error, trial court must be affirmed).

More important, the prosecutor did nothing to prevent Randall from calling Sanders. The mere fact that Sanders invoked the Fifth Amendment does not prove otherwise. Randall certainly was entitled to call Sanders and elicit any testimony that did not incriminate Sanders. Also, Randall could have called Sanders and elicited the exculpatory version related in the later deposition, and provided Sanders a chance to explain the inconsistency; subject, obviously, to cross-examination. The matter would then be left to the jurors, who would consider Sanders' credibility.

Randall did not attempt to call Sanders. The only reasonable inference is that he declined to do so for strategic reasons. Randall cannot mischaracterize Sanders as his own witness, ignore his counsel's strategic decision, and still claim error on appeal. Moreover, there is no reason to believe Sanders, an admitted liar, would testify as Randall hoped. Randall's claim that he was denied a favorable witness is conjectural at best.

What is not conjectural is the possibility that Sanders' later inconsistent statements were the product of improper influence by Randall. One State witness (Cummings) testified that Randall telephoned him several times (T 623) after the two spoke at the jail. (T 620). Randall told Cummings not to give a deposition (T 624), and to tell other witnesses to state that they did not see anything. (T 622). Randall also told another State witness (Cosby) not to talk to the police. (T 466).

Therefore, the record reveals that Randall was attempting to block unfavorable testimony, strongly indicating the source of Sanders' abrupt change. Based on his own wrongdoing, Randall asks this court to make the heroic assumption that Sanders would have testified favorably to Randall, and asks this court to remain oblivious to the devastating impeachment that would follow.

Randall's third error is to portray the filing of perjury charges against Sanders as misconduct. He cannot, and does not, cite any authority that mere exercise of prosecutorial discretion to file charges is misconduct.

Implicitly, Randall is maintaining that this amounted to coercion. However, it was Sanders who chose to lie. Before his first statement and before his deposition, Sanders was told to tell the truth and warned against perjury. This does not amount to coercion. *See*, Burr v. State, 466 So.2d 1051, 1053 (Fla. 1985)(no coercion when prosecutor did not threaten or act hostile toward witness who changed her story, but merely emphasized the importance of telling the truth).

Brookins v. State, 495 So.2d 135 (Fla. 1986), weighs heavily against Randall. There, the defendant was convicted for first-degree murder. He contended that a prosecution witness was coerced inta giving incriminating testimony by being threatened with a perjury charge. Rejecting this claim as being without merit, the court tersely noted the witness testified that he did not want to got to jail for perjury and agreed to tell what he knew. In short, the fact that the prosecutor emphasized, to a recalcitrant witness, the importance of telling the truth does not amount to coercion. *Id.* at **141.**

Here, neither Sanders' first sworn statement nor his later deposition were coerced. Sanders voluntarily changed his story so radically that the prosecutor filed perjury charges, a matter unknown to Randall's jury. (T **942).** Randall, who pressured at least two other witnesses not to testify or to testify falsely, now has the audacity to claim Sanders' decision to invoke the Fifth Amendment deprived him of a favorable witness! Of course, nothing in the record indicates Sanders decided to invoke the Fifth Amendment to avoid self-incrimination as to the perjury charge. He may have feared (rightly or wrongly), that he would emerge as an accessory to the shootings. If so, the pendency of perjury charges was irrelevant to his decision.

Through his counsel for an unrelated burglary charge, Sanders invoked the Fifth Amendment as to the entire contents of the deposition. (T **943-4).** Apparently Sanders was worried about criminal charges arising from his actions after the shooting. In

any event, Randall asks this court to assume the pendency of perjury charges forced Sanders not to testify. Randall's assumption is not borne out in the record. For this reason alone, the trial court must be affirmed. *See*, Applegate, *supra*; **Sapp v. State**, 411 So.2d **363** (Fla. 4th **DCA** 1982)(it is incumbent on an appellant to bring forward a record clearly demonstrating that the trial court was put on notice of the precise ground for an objection).

In Enmund v. State, 399 So.2d 1362 (Fla. 1981), *death penalty* ***reversed*** *on* ***other grounds sub*** *nom.*, Enmund v. Florida, 458 U.S. 782, 102 S.Ct. **3368, 73** L.Ed.2d 1140 (1982), a witness was ultimately called **as** a court witness since the prosecution was unable to vouch for her credibility. Similar to this **case,** the witness was a friend of the defendant, who was linked to two murders by the witness' original deposition. When the witness gave a different story immediately before trial, the prosecutor confronted her with three options: refuse to testify and face contempt charges and jail; testify differently from her first deposition and face 15 years in jail for perjury; or "tell the truth" so that nothing would happen to her. This confrontation **was** revealed to the jury. *Id.* at **1368.** Under these circumstances, Enmund claimed the prosecutor's admonitions amounted to a form of "coercion." Rejecting Enmund's argument, the Supreme **Court** held the trial **court** did **not** abuse its discretion in allowing the witness to testify. *Id.*

Here, the prosecutor did not go as far. The record reveals only that perjury charges were filed. Nothing indicates Sanders

was told he could face jail for perjury. Sanders did not agree to revert to his first story, and so testify.

Randall requested more than exclusion; he requested mistrial. (R 65-8; T 512-15). In part, that motion was based on the filing of the perjury charges. (T 514). Mistrial is an extreme sanction, to be granted only in cases of "absolute legal necessity." Wilson v. State, 436 So.2d 908, 911 (Fla. 1983). There was no legal necessity for mistrial here, as Sanders' decision to invoke the Fifth Amendment was not precipitated by State action. If allowance of testimony were not an abuse of discretion in Enmund, denial of mistrial here was not an abuse of discretion.

To sum: the mere filing of perjury charges was not prosecutorial misconduct. The record does not how that Sanders was a defense witness; or, if so, that Sanders decided to invoke the Fifth Amendment in response to the perjury charge. Had Sanders proceeded to testify, the trial court would not have erred in allowing his testimony. The court certainly did not err by denying the much more extreme sanction of mistrial.

Finally, any misconduct by the prosecutor amounts to harmless error. For the reasons stated in Issues II and IV, the outcome of the verdict could not have been affected by Randall's claimed inability to put an admitted liar on the stand. Consequently, **any** error was harmless. ***See,*** Fulminate, *supra* (announcing that coerced confessions are subject to harmless error analysis); DiGuilio, *supra* (harmless error analysis applied to prosecutor's comments on defendant's silence).

ISSUE IV

WHETHER A DISCOVERY DEPOSITION MUST BE ADMITTED AS SUBSTANTIVE EVIDENCE SIMPLY BECAUSE THE DECLARANT IS *AN* UNAVAILABLE WITNESS

Like all of Randall's ancillary issues (II - V herein), this one is outside the scope of the jurisdictional question. It should not be **reached.**

Randall claims, in essence, that a discovery deposition -- not taken under Fla.R.Crim.P. 3.190(j) to preserve testimony -- must be admitted into evidence for **the** truth of the matter asserted, whenever the deposition is somewhat exculpatory.

Again, the deposition at issue was not taken to perpetuate testimony in accord with Rule 3.190(j). This court declared only yesterday that such depositions are not admissible:

> We are presented with the question of whether a deposition is admissible as substantive evidence, under section 90.804(2)(a) of the evidence **code**, when, at the time of its taking, opposing counsel is not alerted by compliance with Rule of Criminal Procedure 3.190(j) that the deposition may be used at trial. We hold that it is not.

Rodriguez v. State, case no. 74,978 (Fla. Oct. 8, 1992), slip op. at **p.** 9 (citations omitted).

Randall relies on perceived conflict between the rule of criminal procedure as to depositions taken to perpetuate testimony and subsection (1) of 890.804, Fla. Stat. By failing to read all

of 890.804, Randall fails to address the fact that the deposition did not meet all the requirements for admissibility. *Assuming* a conflict between Rule 3.190(j) and §90.804 does not help Randall, as the deposition was not admissible under that statute.

Sanders was originally listed as a State witness. Randall claims he was later made a defense witness. The State does not concede that Sanders was ever designated as a defense witness, since the record does not reveal such. *(See* the State's answer to Issue III herein). Assuming Sanders can be considered a defense witness, the State agrees that he became unavailable through his unchallenged assertion of hi5 Fifth Amendment right as to all questions and answers in his deposition. (T 943-4). See, Brison v. State, 382 So.2d 322, 324 (Fla. 2d DCA 1979)(witness became unavailable when trial court sustained assertion of Fifth Amendment).

Beyond mere unavailability of Sanders himself, Randall met none of the requirements of 890.804 to establish admissibility of Sanders' deposition. Subsection (1), in addition to defining "unavailability," prohibits admission of statements procured by a defendant's wrongdoing.[4] Subsection (2) requires that the hearsay statement by an unavailable witness be former testimony, be given

[4] Testimony by two State witnesses revealed that Randall contacted them from jail, and told them not to give depositions or to make false statements. *(See* Issue III herein).

under belief of impending death or against interest, or be in regard of personal or family history.[5]

Sanders' deposition was not given under belief of impending death, and had nothing to do with personal or family history. It could not be admitted as a statement against interest under §90.804(2)(c), as Randall proffered no "corroborating circumstances [to] show the trustworthiness of the statement." To the contrary, Sanders' deposition concluded with the admission he was a liar; that he had lied when giving his first sworn statement. (Def. Ex. G, p. 34, lines 22-4). Also, Sanders' version of events was directly contradicted by Pugh, Williams, Cosby and Cummings; other State witnesses who had already testified to seeing Randall do the shooting. (T 351-2, 404-5, 456-7, 614). Significantly, Cosby and Cummings also testified that Randall told each not to talk to the police (T 466, 624), raising the distinct possibility that Randall was pressuring other witnesses.

Assuming no improper conduct by Randall, Sanders' deposition would still have to meet the requirements of "former testimony" under §90.804(2)(a). That statute provides, in relevant part, that "former testimony'' includes statements given in a deposition:

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[5] Subsection (2) of 890.804 does not contain a fifth exception to inadmissibility as does the federal rule. The latter allows admission of statements not covered by the first four exceptions (the same as Florida's) when the hearsay meets three conditions and has "equivalent" guarantees of trustworthiness. *See* Fed.R.Ev. 804(b)(5).

> taken in compliance with law in the course of the same or another proceeding, if the party against whom the testimony is now offered . . . had an opportunity and similar motive to develop testimony by direct, cross or redirect examination.

Sanders' deposition meets none of these conditions. Sanders had been designated a State witness (R 18) for seven months, and was obviously not even a potential defense witness until he gave the deposition at issue. The prosecutor briefly questioned Sanders during the deposition (Def. Ex. G, p. 32-5), but certainly did not have any motive to develop testimony that would exculpate Randall. *See*, Rodriquez, *supra*, slip op. at 23, n. 5 (Kogan, J., concurring)(noting two instances when the prosecutor would not have the same motive to cross-examine during the deposition); and Jackson v. State, 453 So.2d 456 (Fla. 4th DCA 1984)(recognizing that State may not have same motive to develop testimony when deposition not taken to preserve testimony).

Further instruction is provided by the "Law Revision Council Note - 1976" found in 6C Fla.Stat.Anot. at 359:

> The former testimony exception applies in criminal cases only when the party against whom the testimony is offered [here, the State] . . . had the right to cross-examine the declarant with an interest and motive similar to that which he has at the hearing.

Brief questioning of Sanders by the prosecutor is not tantamount to cross-examination, an observation itself dependent on the highly speculative assumption that Randall would have put an admitted liar on the stand.

The obvious flaw in Randall's argument is not his conclusion that the statutory evidence code controls over procedural rules of criminal procedure, but his failure to realize that Sanders' deposition did not meet even the statutory requirements for admissibility. His next -- and almost as obvious -- flaw is his grandiose conclusion that "[e]xclusion of Sanders' deposition resulted in error of constitutional proportion." (initial brief, p. 38). As noted above, four eyewitnesses --- who testified consistently -- all identified Randall as the one who fired the shots. The first defense witness (Robinson) testified that he had gone home, and was not at the bar when the shooting occurred. (T 921-2).

Similarly, the second defense witness (Brock) was not at the scene, and could not testify as to what happened. (T 938). The third defense witness (Corey) testified that the guy complaining about his car had the gun. (T 977). However, she also admitted to not knowing any of the group of men in the vicinity of the shooting, or Randall. (T 980). She was also extensively impeached with her deposition. (T 984-88). She then equivocated as to whether she heard the man complaining about his car, in a manner casting doubt on her testimony that the complaining man did the shooting. (T 990-1).

In short, the State presented four eyewitnesses who clearly identified Randall as the murderer, as well as three other corroborative witnesses. Among the corroborative witnesses was police detective Bachert. Randall admitted doing the shootings to

Bachert, who read Randall's statement to the jury. (T 820-1). Defense presented three witnesses; two of whom were not present, and one who was badly impeached. Under these facts, any error in denying admission of the deposition was harmless, as it did not affect the outcome of the verdict. DiGuilio, *supra.* *See,* State v. Clark, 17 F.L.W. S593 (Fla. Sept. 24, 1992)(admission of discovery deposition subject to harmless error analysis).

ISSUE V

WHETHER THE TRIAL COURT ABUSED ITS DISCRETION IN ALLOWING DEPOSITION OF A WITNESS, RATHER THAN EXCLUSION OF TESTIMONY

This is the fourth ancillary issue not necessary to disposition of the case. It too should not be reached.

A State witness (Darryl Cummings) was listed as such in the State's first response (R 18) to Randall's demand for discovery. That response was served June 18, 1990 (R 19), or about nine months before trial. Cummings' sworn and written statements were noted as "previously provided" in the State's second additional discovery response, which was served December 31, 1990. (R 34).

The State's sixth additional discovery response (served February 26, 1991) noted that two other persons within the State Attorney's office could "testify as to efforts to locate missing witnesses if this becomes an issue." (R 45). This is significant for two reasons. First, as part of the sixth additional discovery response, it is obvious that the prosecutor was conscientiously

complying with the rules of discovery. Second and equally important, it gave notice to Randall that there could be a problem with missing witnesses.

It must be remembered that Darryl Cummings was Randall's friend (T 620), and was present when the shooting occurred. (T 611-13). Even so, defense counsel had no success in trying to subpoena Cummings for deposition, or to otherwise contact him. (R 61, T 495-6).

Cummings was subpoenaed and appeared for deposition on June 7, 1990. Because defense counsel ran two hours late (T 504), the deposition was not taken. Cummings was served again on August 2, 1990, but did not show. (T 495-7). Randall did not attempt to compel Cummings' attendance, or apply for an increase in investigator's fees. (T 498). All of this transpired 7 to 9 months before trial.

Randall has omitted the prosecutor's response at the hearing to exclude Cummings' testimony. The prosecutor replied, without objection, that he lost contact with Cummings after he showed for a deposition on June 7. (T 504-5). The prosecutor sent a State Attorney investigator and a detective out to find Cummings, but to no avail.

Nevertheless, the prosecutor ultimately got Cummings to his office, and immediately called defense counsel. Defense counsel requested a half hour to prepare, and showed up two hours later with a motion to exclude testimony. (T 507).

This occurred on March 1, 1991 (R 60), four days before the evidentiary part of the trial began. Rather than depose Cummings when he had the chance, defense counsel declined and chose to attempt to exclude Cummings' testimony. Apparently, Randall thinks the State must keep all potential witnesses available at his convenience for months. This is not true; Randall cites no authority for such an extreme position.

To the contrary, no discovery violation occurred. At most, witness Cummings failed to appear for depositions through no fault of the State, which had difficulty locating him later. Failure of a witness to appear for deposition is not a discovery violation. Goodwin v. State, 580 So.2d 176, 178 (Fla. 1st DCA 1991). Goodwin is particularly useful. It involved a substitute witness, a police detective, who failed to appear for deposition six weeks before trial. Presumably, a police detective's whereabouts are much better known than a witness who was told by Randall not to "come down" to the police station and give a deposition. (T 624).

Cummings testified to Randall's efforts at witness-tampering. Obviously, Randall knew how to find him. It is simply incredible that Randall would argue a "discovery violation" through the State's successful last-minute effort to find Cummings. Randall wants the benefit of his own wrongdoing: to pressure witnesses not to be available (and perhaps falsely testify) and then claim a discovery violation when the State is finally able to locate the witnesses. This court must not condone such blatant abuse of the trial process.

Next, this issue is not properly preserved for review. When the trial court directed that Cummings be deposed during a lengthier recess for lunch (T 512, 590), defense counsel did not object further. Instead, counsel provided a handwritten motion for mistrial alleging a "pattern" of discovery violations. (T 512-15). This motion added nothing to Randall's implicit position that exclusion was the only appropriate remedy short of a mistrial.

In contrast, Fla.R.Crim.P. 3.220(n)(1) requires the trial court to take actions "deemed just under the circumstances."[6] Randall did not, for example, request the court to prohibit the State from inquiring into allegations of witness tampering, but otherwise allowing the witness to testify after being deposed. *See*, Taylor v. State, 292 So.2d 375 (Fla. 1st DCA 1974)(defendant, if surprised by disclosure of witness 30 minutes before trial, should have moved for a continuance rather than exclusion). *See also*, Wilkerson v. State, 461 So.2d 1376 (Fla. 1st DCA 1986)(exclusion of witness an extreme sanction to be invoked only under the most compelling circumstances).

The issue (and standard for review) is whether the remedy fashioned by the trial court was an abuse of discretion that resulted in prejudice to Randall. State v. Hall, 509 So.2d 1093 (Fla. 1987)(trial court has discretion to determine whether State's noncompliance results in harm to defendant); Wilkerson, *supra* (ruling on whether discovery violation requires exclusion is

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[6] This, of course, assumes a discovery violation by the State, a matter that is not conceded.

discretionary matter not to be disturbed unless abuse clearly shown).

The trial court did not abuse its discretion. It did not find a discovery violation at all, and further stated that "any procedural deficiency" would be cured by a deposition. (T 516). The court simply declined the only remedy Randall requested, that of exclusion. *See,* Wilkerson, *supra.*

Later argument before the trial court reveals defense counsel's real problem with Cummings' anticipated testimony. Defense counsel claimed he could not adequately investigate the claims that Randall was telling State witnesses not to appear for deposition or, possibly, to testify falsely. (T 591-2). Such testimony was eventually given by Cummings (T 622-4), who also admitted to receiving and ignoring other notices to appear for deposition. (T 662).

Cummings testified that Randall told him not to be deposed, etc. during the course of one jail visit and three or four phone calls. (T 623). Obviously, Randall knew how to contact Cummings. Apparently he chose not to give this information to his own counsel. Through "due diligence" of informing hi5 own counsel, Randall could have obtained Cummings' presence for a deposition; which, of course, Randall was pressuring Cummings not to do. Under these circumstances, any failure on the State's part is not grounds for relief. *See,* State v. Cohen, 272 So.2d 550 (Fla. 1st DCA 1973), *aff'd,* 294 So.2d 82 (Fla. 1974)(requirement of prompt disclosure not applicable when information available to defendant through due diligence).

In a similar vein, Randall's attempts to prevent Cummings' deposition are the real cause of any prejudice. In contrast, the State immediately disclosed its successful last-try attempt to locate Cummings. To obtain relief, Randall must show any prejudice arose through the State's untimeliness, not his own wrongdoing. Johnson v. State, 461 So.2d 1385, 1389 (Fla. 1st DCA 1984).

Randall was not hampered in putting on his defense. He cross-examined Cummings at great length (T 625-61), and recross-examined him specifically about his refusal to appear. (T 662). Unfortunately for Randall, Cummings also testified that he saw Randall do the shooting. (T 614-16). This testimony was known to Randall months before trial, as Cummings gave a sworn statement[7] to that effect in April, 1990. (See Def. Ex. 1, p. 39).

Counsel's only specific claim of prejudice is specious. Counsel claimed he would have investigated to learn whether anyone overheard the phone conversations between Randall and Cummings. (T 591). Of course, Randall would know if they were overheard at his end. Upon deposing Cummings during trial, defense counsel should have learned if other overheard Cummings's side of the conversation. Defense counsel did not renew the motion for exclusion or limitation of testimony after deposing Cummings, a fact strongly indicating that nothing new was learned. Randall simply was not prejudiced by the remedy directed by the trial court, which correctly recognized the matter was one of witness

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[7] Cummings' sworn statement was disclosed in the State's first response to Randall's discovery demand, which response was served June 18, 1990. (R 19).

credibility for the jurors to assess. (T 592). Absent prejudice through the State's untimeliness, Randall is not entitled to relief. Richardson v. State, 246 So.2d 771, 779 (Fla. 1971).

Thompson v. State, 561 So.2d 1311, 1315-17 (Fla. 1990), strongly supports the trial court's action. There, a state witness (defendant's wife) could not be subpoenaed by the defense because she fled, apparently to Georgia. In the first contrast to this case, the witness spoke to the prosecutor a few weeks before trial. The State sent an investigator only after defense counsel's opening indicated the defense would attempt to blame her for the murder. Ultimately, the witness was procured and brought to the prosecutor's office. Again in contrast to this case, the witness was made available only after the defendant had testified. The State disclosed her as a rebuttal witness. After a Richardson hearing, the court allowed the defense an hour to take a deposition before the witness testified. *Id.* at 1315. Despite being "more troubled'' by the prosecutor's failure to disclose the witness' whereabouts; a finding that some delay in disclosure was willful (id. at 1316); and a finding that the witness was a substantial figure in the case; the court concluded that allowing her to be deposed averted prejudice to Thompson. *Id.*

Here, the State did nothing to conceal Cummings; and, in fact, presented Randall with an opportunity to depose him several days before the evidentiary part of trial. Randall's counsel had given his opening statement, but Randall had not testified. Defense counsel's complaint that he could not investigate the

witness tampering allegations is belied by his decision not to renew his motion to exclude testimony (in whole or part) after taking Cummings' deposition. Nothing precluded counsel from doing so. He cannot complain because the trial court denied the overly harsh remedy requested before deposition. Just as any procedural prejudice was cured by in-trial deposition in Thompson, the same device cured any prejudice here.

Finally, any error by the trial court was harmless. As described in Issues II through IV herein, the State's case was overwhelming. Excluding Cummings' testimony, there were three other eyewitnesses that clearly identified Randall. There were Randall's incriminating statements to Detective Bachert, and the highly corroborative testimony of the medical examiner. Randall's defense was very weak; the testimony of his only eyewitness was inconclusive as to identity, and badly impeached. Any error in allowing all of Cummings' testimony could not have affected the verdict, and was thus harmless. DiGuilio, *supra.*

CONCLUSION

The certified question must be answered in the negative, thereby affirming Randall's sentence and reversing the First District on the first issue. Issues II through V should not be reached. If considered, Randall's arguments must be rejected, thereby upholding his conviction and affirming that aspect of the opinion below.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Respondent's Brief on the Merits has been furnished by U.S. Mail to MR. GLEN GIFFORD, Assistant Public Defender, Office of the Public Defender, Second Judicial Circuit of Florida, Leon County Courthouse, Fourth Floor North, 301 South Monroe Street, Tallahassee, Florida 32301, this 9th day of October, 1992.

CHARLIE MCCOY