IN THE SUPREME COURT OF FLORIDA

ALVIN L. MORTON, :

Appellant, :

vs. : Case No. 83,422

STATE OF FLORIDA, :

Appellee. :

_____ :



APPEAL FROM THE CIRCUIT COURT
IN AND FOR PASCO COUNTY
STATE OF FLORIDA

# REPLY BRIEF OF APPELLANT

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TENTH JUDICIAL CIRCUIT

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## PRELIMINARY STATEMENT

The state's brief will be referred to herein by the symbol "S". Other references are as denoted in appellant's initial brief.

This reply brief is directed to the state's "past recollection recorded" argument in Issue I (S15-19). As to all other aspects of Issue I, and as to Issues II through VI, appellant will rely on his initial brief.

## SUMMARY OF THE ARGUMENT

The witnesses' out-of-court statements made during the State Attorney's investigation and in depositions were not admissible on the theory (asserted by the state for the first time on appeal) of "past recollection recorded" because (1) the written memoranda or records were not prepared by the witness, as required by Florida's Evidence Code; and (2) even if Florida followed the federal rule which -- provided that stringent foundational requirements are met -- allows a written memorandum or record prepared by another to be admitted as "past recollection recorded" where it is shown that the writing was "adopted" by the witness, no such showing was made in this case. In addition, the state's attempt to "backdoor" a plethora of transcribed hearsay statements into the trial in this manner would, if successful, render the bright-line rule of State v. Delgado-Santos, 497 So. 2d 1199 (Fla. 1986) and its progeny completely meaningless.

The remaining arguments by the state, including its superficial "harmless error" argument, are fully addressed in appellant's initial brief.

## ARGUMENT

### ISSUE I

MORTON'S RIGHT TO A FAIR TRIAL WAS VIOLATED BY THE PROSECUTOR'S REPEATED INTRODUCTION OF THE OUT-OF-COURT STATEMENTS OF HIS OWN WITNESSES IN THE GUISE OF IMPEACHMENT, AND HIS USE OF THOSE STATEMENTS -- MOST OF WHICH WERE MADE DURING THE STATE ATTORNEY'S INVESTIGATION -- TO PROVE THE TRUTH OF THE MATTERS ASSERTED.

### K. Past Recollection Recorded

Relying on the "right for the wrong reasons" doctrine (S15-16), the state seeks to retrospectively justify the prosecutor's strategy of permeating this trial with hearsay by contending on appeal that it all could have come in under the "past recollection recorded" exception to the hearsay rule (S15-19). The state is wrong for the wrong reasons. Even if the state had raised this theory at trial (and if it had attempted to meet the strict foundational requirements of this hearsay exception), the witnesses' statements from the State Attorney's investigation and the depositions plainly would not have been admissible as "past recollection recorded" under Florida's Evidence Code (which requires, inter alia, that the memorandum or written record have been personally made by the witness ) nor even under the somewhat more expansive Federal rule. In addition, the state's argument, if accepted, would render meaningless the bright-line rule of State v. Delgado-Santos, 497 So. 2d 1199 (Fla. 1986); Dudley v. State, 545

So. 2d 857, 859 (Fla. 1989); State v. Smith, 573 So. 2d 306, 315-16 (Fla. 1990); and Ellis v. State, 622 So. 2d 991, 997-98 (Fla. 1993), that statements made under oath during a State Attorney's investigation or police interrogation are inadmissible as substantive evidence. See also Wilkes v. State, 541 So. 2d 1211 (Fla. 1989) noting that "[t]o rule otherwise would effectively deny the defendant his right of cross-examination." This Court wrote in Smith:

> . . . [T]he question in this case is whether, under the statute, the Delgado-Santos rationale applies to a prosecutor's investigative interrogation. We conclude that it must. [Footnote omitted] When Estes gave the statement at issue, she was brought into a room where a deputy sheriff and a prosecutor were waiting with a court reporter to interrogate the seventeen-year-old about a homicide in which she had just been involved. No counsel was present to advise her or to protect Smith's interests; no cross-examination was possible, and no judge was present or made available to lend an air of fairness or objectivity. This prosecutorial interrogation was "neither regulated nor regularized," Delgado-Santos, 471 So. 2d at 781; it contained "none of the safeguards involved in an appearance before a grand jury" and did not "even remotely resemble that process," id.; nor did it have any "quality of formality and convention which could arguably raise the interrogation to a dignity akin to that of a hearing or trial." Id. At bottom, prosecutorial interrogations such as the one here provide no "degree of formality, convention, structure, regularity and replicability of the process" that must be provided pursuant to the statute to allow any resulting statement to be used as substantive evidence to prove the truth of the matter asserted. . . . .

Since a court reporter or police stenographer is almost invariably present during the taking of a sworn statement in a

State Attorney's investigation or police interrogation[1] (or else a court reporter can later transcribe a tape recorded statement), the state's "past recollection recorded" argument could be used to circumvent the Delgado-Santos rule in virtually every case. The fatal flaw in the state's argument is that a court reporter's transcription of a witness' oral statement is not a memorandum or a written record made by the witness, and therefore the "past recollection recorded" exception is by its plain terms inapplicable. See Hendrieth v. State, 483 So. 2d 768, 769 (Fla. 1st DCA 1986) (recorded recollection exception inapplicable where "[t]he report from which the officer testified as to what Campbell told him was not `made by the witness', however, but was a synopsis made by the officer"); Auletta v. Fried, 388 So. 2d 1067, 1068 (Fla. 4th DCA 1980) (report "was not prepared by the witness and therefore does not represent past recollection recorded").

The "recorded recollection" exception set forth in Florida's Evidence Code, §90.803(5), Fla. Stat., is in one main respect significantly more restrictive than the corresponding Federal Rule of Evidence 803(5). The Florida statute defines recorded recollection as:

> [a] memorandum or record concerning a matter about which a witness once had knowl-

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[1] See also Delgado-Santos v. State, 471 So. 2d 74, 75 (Fla. 3d DCA 1985), opinion adopted in State v. Delgado-Santos, 497 So. 2d 1199 (Fla. 1986), in which the witness' sworn statement in the police interrogation was transcribed and read to the witness, who then initialed each page and signed at the conclusion. Compare this to the instant case, where there is nothing to indicate that the witnesses ever adopted or vouched for the accuracy of the transcripts prepared by the court reporters.

> edge, but now has insufficient recollection to enable the witness to testify fully and accurately, shown to have been made by the witness when the matter was fresh in the witness' memory and to reflect that knowledge correctly.

while the Federal Rule defines it as:

> [a] memorandum or record concerning a matter about which a witness once had knowledge but now has insufficient recollection to enable the witness to testify fully and accurately, shown to have been made or adopted by the witness when the matter was fresh in the witness' memory and to reflect that knowledge correctly.

Previously the two provisions had been identical, but in 1978 the Florida legislature amended §90.803(5) by deleting the language which had included memoranda and records which were "adopted" by the witness. See Ehrhardt, Florida Evidence, §803.5 (1996 Ed.). "When the legislature amends a statute by omitting words, we presume it intends the statute to have a different meaning than that accorded it before the amendment." Capella v. City of Gainesville, 377 So. 2d 658, 660 (Fla. 1979); see Aetna Casualty and Surety Co. v. Buck, 594 So. 2d 280, 283 (Fla. 1992). Therefore, while the federal courts (and the courts of other states whose evidence codes track the federal rule) will under certain circumstances allow the admission of a transcript of a witness' prior statement under the "past recollection recorded" exception (provided that strict foundational requirements are satisfied, including a showing that the witness read and adopted the transcript at or near the time it was made, and vouches for its accuracy), these courts invariably analyze the issue under the "or

adopted" language of the federal rule (or state rule or statute).[2] The "past recollection recorded" exception as defined in Florida's Evidence Code contains no such language; the legislature deleted it nearly twenty years ago.

Therefore, under the law of this state, a court reporter's or police stenographer's transcript can never be admitted as "past recollection recorded," except where the court reporter or stenographer happens to be the witness whose recollections are relevant to the case but who no longer retains sufficient memory. That was the case in Middleton v. State, 426 So. 2d 548, 550-51 (Fla. 1982), a decision which the state describes as controlling (S15,18-19), but which is actually completely off point. The issue in that case was the manner in which Middleton's confession was authenticated. It was not the substance of Middleton's confession which was found to be admissible as "past recollection recorded"; but rather it was the procedure of having the stenographer read it to the jury which was held to be proper on that basis. "The stenographer testified that he had no independent recollection of [Middleton's] confession, but that he had personally recorded the statement verbatim and had accurately transcribed his notes into the written statement which he then read to the jury. We hold that the stenographer's testimony was admissible as "past recollection recorded." 426 So. 2d at 551. [Once the authenticating testimony of the person who prepared the written document was found to be admissible, there was no hearsay problem as far as the substantive

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[2] See the cases cited at p. 9-10 of this reply brief.

admissibility of Middleton's statements, since an out-of-court confession or admission by an accused is admissible under §90.803-(18), Fla. Stat., when offered by an adverse party. See Swafford v. State, 533 So. 2d 270, 274 (Fla. 1988); Moore v. State, 530 So. 2d 61, 63 (Fla. 1st DCA 1988)].

Thus, in Middleton the person who "once had knowledge, but now has insufficient recollection" [§90.803(5)] was the stenographer himself. In Middleton, the person who prepared the writing vouched for its accuracy, and the contents of the statement were independently admissible as admissions of a party-opponent; while in the instant case the various court reporters who prepared the transcripts did not testify, the witnesses whose oral statements were transcribed never adopted them or vouched for their accuracy (and in some instances may never have even read them), and -- most importantly -- the contents of the statements were otherwise inadmissible under the Delgado-Santos rule. Consequently, Middleton does not remotely support the state's position.

As previously mentioned, Federal Rule of Evidence 803(5) differs significantly from the applicable Florida law in one highly significant respect. As stated in McCormick on Evidence §281 (4th Ed. 1992), to be admissible as recorded recollection under the federal rule, the "writing need not, however, have been prepared by the witness personally if the witness read and adopted it." The Florida legislature, on the other hand, chose in 1978 to amend the state's statutory provision by deleting the language which referred to writings which had been "adopted" by the witness. Ehrhardt,

Florida Evidence, §803.5 (1996 Ed.). The federal courts and the states which follow the federal rule uniformly require the party seeking admission of an "adopted" writing as "past recollection recorded" to satisfy strict foundational prerequisites, including that he establish that the writing or transcription was shown to the witness at a time when the events were fresh in his mind, and that the witness at or about that time had vouched for the accuracy of the written document. See e.g. United States v. Schoenborn, 4 F. 3d 1424, 1427-28 (7th Cir. 1993); United States v. Williams, 571 F. 2d 344, 348 (6th Cir. 1977); People v. Ballard, 32 Cal. Rptr. 233, 242 (Cal. App. 1963); State v. Thompson, 397 N.W.2d 679, 682-83 (Iowa 1986); State v. Tharp, 284 So. 2d 536, 542 (La. 1973); State v. Gremillion, 428 So. 2d 940, 943 (La. App. 1 Cir. 1983); Baker v. State, 371 A. 2d 699, 702 (Md. App. 1977); Commonwealth v. Fryar, 610 N.E. 2d 903, 912 (Mass 1993); Commonweath v. Daye, 454 N.E. 2d 502, 506 (Mass. App. 1983); Moncrief v. City of Detroit, 247 N.W.2d 783, 787 (Mich. 1976); People v. Kubasiak, 296 N.W.2d 298, 302 (Mich. App. 1980); People v. Hoffman, 518 N.W. 2d 817, 825 (Mich. App. 1994); Walker v. Larson, 169 N.W. 2d 737, 742 (Minn. 1969); Jim's Excavating Service v. HKM Assoc., 878 P. 2d 248, 256-57 (Mont. 1994); People v. Bici, 449 N.Y.S. 2d 250, 252 (App. Div. 2d Dept. 1982); State v. Scott, 285 N.E. 2d 344, 348 (Ohio 1972); Dayton v. Combs, 640 N.E.2d 863, 869-70 (Ohio App. 2 Dist. 1993); State v. Coppola, 502 A. 2d 802, 807 (R.I. 1985); State v. Vento, 533 A. 2d 1161, 1165 (R.I. 1987); State v. Lander, 582 A. 2d 128

(Vt. 1990). In the instant case, the prosecution did not attempt to meet -- and could not have met -- these requirements.[3]

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[3] See State v. Thompson, supra, 397 N.W.2d at 683, in which the Supreme Court of Iowa (which follows the federal rule which encompasses writings "adopted" by the witness) wrote:

> Concerning the required showing as to accuracy of the record or memorandum capturing the witness's recollection, the rule does not require that the witness himself be the one who actually makes the written record of the events. But, when it is made by someone else, the "adopted by the witness" language appears to require the witness to testify that he or she saw the memorandum when the matter was fresh in the witness's memory and then knew it to be correct. See United States v. Felix-Jerez, 667 F.2d 1297, 1299-1300 (9th cir. 1982). A leading commentator has observed, in this regard, that
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> > [t]he jury should hear the witness state under oath that the prior statement was accurate and he should be subject to cross-examination on this point. [A] witness's failure to say that . . . he gave the statement [and] it was accurate prevent[s] application of Rule 803(5).
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> 4 J. Weinstein & Berger, Weinstein's Evidence P 803(5)[01], at 167 n. 48 (1985).
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> We agree with the foregoing observation and believe the State's failure to obtain Werle's acknowledgment that the transcript of the proffered deposition testimony accurately conveyed her knowledge at the time prevents application of rule 803(5) in the present case. This deficiency is not supplied, as the State suggests, by Werle's testimony that she had attempted to testify truthfully at her deposition. The issue involved not only the accuracy of the statements which were made by the witness but also the accuracy of the written record of those statements made by the court reporter.

The state on appeal, quoting Walker v. Larson, 169 N.W. 2d 737, 741, 743 (Minn. 1969), contends "[t]he trial judge is in the best position to pass on all the facts and circumstances regarding the reliability of records of past recollection and . . . his discretion should be questioned only when its abuse is clearly shown." However, the trial judge in the instant case never ruled one way or the other as to whether the five witnesses' statements from the State Attorney's investigation and the depositions fell under the "past recollection recorded" exception, because the prosecution never contended at trial that they did, and never attempted to lay a foundation to try to admit them under that theory.[4] Now, on appeal, the state is asking this Court to accord great discretion to a nonexistent ruling. (And one which, if made, would have been patently wrong). Procedural default rules apply not only to defendants, but also to the state. Cannady v. State, 620 So. 2d 165, 170 (Fla. 1993). The state cannot free itself from compliance with the foundational requirements of a hearsay exception by offering the evidence under a different erroneous theory at trial, and then coming back on appeal with a "right for the wrong reasons" argument -- especially when the newly proffered theory is as inapplicable as the one originally relied on.

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[4] This in turn prevented the defense from objecting based on the inadequacy of the foundation [see State v. Lander, supra, 582 A. 2d at 128], or from conducting a voir dire with respect to the foundational requirements [see People v. Bici, supra, 449 NYS 2d at 252.] See also State v. Tharp, supra, 284 So. 2d at 542 (if the witness 'was testifying as to past recollection recorded, the defendant had the right to so ascertain").

Finally, the state disingenuously argues that "much of the challenged testimony was simply a result of the state offering the witness his or her prior testimony in order to refresh the witness' recollection of the events that occurred two years before trial", and that in that situation it is not necessary to comply with §90.803(5) (S14-15). See Ehrhardt, Florida Evidence §803.5 (1996 Ed.) (distinguishing past recollection recorded from the practice of refreshing a witness' recollection). In contrast to past recollection recorded, a document used only to jog a witness' independent recollection:

> need not be personally written by the witness, need not comply with the best evidence rule, need not have been made contemporaneously with the event, and in fact, need not be independently admissible. Since the document is not being offered into evidence, it is not necessary to lay a foundation prior to showing it to the witness. Since inadmissible evidence can be used to refresh recollection, care must be taken to insure that a party is not unduly prejudiced by the process.

Ehrhardt, Florida Evidence §613.1 (1996 Ed.) (footnotes omitted).[5]

The gaping flaw in the state's argument is that (except in one or two isolated instances) the prosecutor did not show the witness the statements from the State Attorney's investigation, he read them aloud to the witness and the jury. Usually he would then ask the witness if the prior statement was true[6] (thus revealing his

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[5] See also Garrett v. Morris Kirschman and Co., Inc., 336 So. 2d 566, 569-70 (Fla. 1976) in which this Court said "When a writing is used only to revive present recollection, it need not have been written by the witness himself."

[6] See T330,336,400-03,412,515-16,542,550-51,555,575,606,612, 614,651,710-11,713,722,725-27.

use of the statements as substantive evidence), but occasionally he would also or instead ask the witness if it refreshed his or her recollection. (See T392,402,523,555,614,615,711,715,727). (Sometimes it did and sometimes it didn't). Putting before the jury inadmissible evidence which is ostensibly being used to "refresh recollection" is a technique which has been bluntly described as "patent error." Goings v. United States, 377 F. 2d 753, 761 (8th Cir. 1967); see Wilkins v. United States, 582 A. 2d 939, 942-43 (DC App. 1990):

> Refreshing a witness's recollection by memorandum or prior testimony is perfectly proper trial procedure and control of the same lies largely in the trial court's discretion. However, if a party can offer a previously given statement to substitute for a witness's testimony under the guise of "refreshing recollection," the whole adversary system of trial must be revised. [Footnote omitted]. The evil of this practice hardly merits discussion. The evil is no less when an attorney can read the statement in the presence of the jury and thereby substitute his spoken word for the written document.

Goings v. United States, supra, 327 F. 2d at 759-60.

When a prior statement is used to refresh a witness' recollection, "the contents of the statement are not to be put in evidence before the jury." Young v. United States, 214 F. 2d 232, 237 (DC Cir. 1954), quoting United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 234 (1940), ("there would be error where, under the pretext of refreshing a witness' recollection, the prior testimony was introduced as evidence"). See Ehrhardt, Florida Evidence, §613.1 (1996 Ed.); Barnett v. State, 444 So. 2d 967 (Fla. 1st DCA 1983); Hill v. State, 355 So. 2d 116 (Fla. 4th DCA 1978).

See also United State v. Turner, 871 F. 2d 1574, 1582 (11th Cir. 1989); United States v. Scott, 701 F. 2d 1340, 1346 (11th Cir. 1983); Thompson v. United States, 342 F. 2d 137, 142 (5th Cir. 1965) (trial court has an obligation to prevent a party from putting into the record the contents of an otherwise inadmissible writing under the guise of refreshing recollection).

In Garrett v. Morris Kirschman and Co., Inc., 336 So. 2d 566, 570 (Fla. 1976), this Court observed:

> If counsel had only to show a writing to a witness, ostensibly in hopes of evoking some recollection, in order to render the writing admissible in evidence, the hearsay rule could be circumvented, simply by reducing hearsay to writing for tendering to the witness. In this fashion, hearsay could be hoisted by its own bootstraps to the status of competent evidence.

In the instant case, the repeated introduction and substantive use of prejudicial hearsay was the centerpiece of the prosecution's trial strategy. The state cannot show on appeal -- as to either the guilt phase or the penalty phase -- that the thoroughly improper manner in which this case was tried could not have had its intended effect on the jury. Appellant must be granted a new trial.

CERTIFICATE OF SERVICE

I certify that a copy has been mailed to Candance Sabella, Suite 700, 2002 N. Lois Ave., Tampa, FL 33607, (813) 873-4730, on this 31d day of June, 1996.

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