IN THE SUPREME COURT OF FLORIDA

CASE NO.: 90,952

JOAQUIN J. MARTINEZ,

Appellant,

vs.

STATE OF FLORIDA,

Appellee.

REPLY BRIEF OF APPELLANT

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STATEMENT OF THE FACTS

Mr. Martinez would stand by the Statement of the Facts set forth in his initial brief. It is noteworthy that the Appellant's Statement of Facts is twice the length of the Appellee's Statement of Facts. The difference is directly proportional to the amount of facts considered relevant by the Appellant which has been discarded by the Appellee in its brief. For example, the State failed to discuss the undisputed fact that there was no forced entry into the residence; that there was no physical evidence linking Mr. Martinez to the crime scene; that there was no evidence regarding a murder weapon linking Mr. Martinez to the crime; there was no evidence of a taking from the crime scene, despite the fact that a wallet and jewelry were left in plain view; that a floor board to an automobile was purportedly saved because it had evidence connecting Mr. Martinez to the crime, and physical analysis of that floor board revealed it had no evidence of any meaningful value; that the transcript utilized by the State at trial was actually prepared by the prosecutor, his secretary and the lead detective in the case, in conjunction with the ex-wife; that one inmate who testified for the State claimed that the murder had been committed by Juan and Maria along with Mr. Martinez, inconsistent with any other version or theory; that another inmate, Gerrard Jones, wrote letters admitting that he lied on the stand and had been promised a sentencing reduction in return for his testimony; that Deputy Shannon saw Mr. Martinez at 6:50 p.m. on the evening of October 27th (a

time when Sloane said that Mr. Martinez had been injured and was wearing clothing that did not fit him) and Deputy Shannon saw nothing unusual about the Defendant; and no mention at all concerning the key alibi witness, Ronnie Sabando, and the fact that the State did not even challenge the alibi testimony in his cross-examination.

Mr. Martinez would set forth these omitted facts within his Reply Brief, and herein notes their absence from the Appellee's Brief.

ARGUMENTS

I.

AN ACCUMULATION OF DISCOVERY VIOLATIONS, PROSECUTORIAL MISCONDUCT, INEFFECTIVE LAWYERING, AND INCOMPLETE LEGAL INSTRUCTIONS FUNDAMENTALLY FLAWED THIS TRIAL AND VITIATED THE RELIABILITY OF THE PROCEEDINGS IN VIOLATION OF THE FLORIDA CONSTITUTION, ARTICLE I, SECTION 9, AND THE UNITED STATES CONSTITUTION, AMENDMENTS V, VI, AND XIV

The State of Florida has conceded that an accumulation of errors can warrant a reversal of a conviction in a particular case. Brief of Appellee at 18. See also, Melendez v. State, 718 So.2d. 746 (Fla. 1998). This concession refines the issue to whether the multitude of errors which occurred in this trial justifies that conclusion here. Mr. Martinez would assert that he is entitled to a new trial:

(1) Where he asserted and proved an alibi, yet no alibi instruction was read to the jury;

(2) Where no physical evidence linked the Defendant to the crime scene;

(3) Where the critical State evidence was an inaudible tape recording bolstered by an unadmitted transcript containing incriminating references not heard on the tape;

(4) Where the only testimony linking Mr. Martinez to the crime came from his ex-girlfriend, who first revealed her testimony eighteen months later on the weekend before trial (coincidentally the same weekend she was told Mr. Martinez may have slept with her step-sister); and

(5) Where the only other prosecution evidence was an uncorroborated jail-house admission to another inmate, including one inmate who has since recanted and confessed to lying at the trial.

The reliability of the proceedings is suspect; there is no trustworthiness to the outcome, especially where prosecutorial misconduct exacerbated the already tainted presentation. See Robinson v. State, 702 So.2d. 213 (Fla. 1997)[1]

Mr. Martinez argued in Point I that prosecutorial misconduct, ineffective assistance of counsel, and the absence of an alibi instruction (where the Defendant proved and argued an alibi) warranted a new trial. Appellee limited its response in Point I to the absence of an alibi instruction, leaving the prosecutorial misconduct and assistance of counsel for subsequent treatment. This Reply will follow that format.

A. The Alibi Instruction

[1] Appellee does not even discuss Robinson in its brief. Robinson's holding that integrity in the process is a paramount concern compels a retrial.

The State sweeps the entire alibi issue aside by stating "Martinez. . . simply failed to establish any alibi defense that would render the absence of an instruction for the defense fundamental error," and "defense counsel's argument to the jury did not suggest that he was relying on an alibi defense." Brief of Appellee at 22, 23. Both of these assertions are incorrect. Providing an alibi was difficult; Mr. Martinez had to hit a moving target, as the time of death changed twice during trial, and again in the State's final argument. But an alibi was proven and was argued by the defense.

1. The Unrebutted Alibi Evidence

The following testimony was elicited and unchallenged and is presented here in the light most favorable to the State:

a. Mr. Martinez was with his ex-wife Sloane until at least 4:00 p.m. on October 27th. (T.6:476-478).

b. A telephone call was placed from the Lawson/McCoy residence to Sherrie McCoy's mother at 5:01 p.m. that afternoon. (T.7:661).

c. Mr. Ronald Sabando testified that Mr. Martinez arrived at his house around 5:00 p.m. that same day and stayed there until a deputy served him with papers. (T.9:875-877).

d. Sloane Martinez testified that after Joaquin left her, she saw him at Mr. Sabando's at 6:00 p.m. (T.6:484).

e. Deputy Shannon testified that he met Sloane around 6:30 p.m., and went with her to serve papers on Mr. Martinez at Mr. Sabando's at 6:50 p.m. (T.7:640-645).

f. Mr. Martinez arrived at an apartment at Indian Rocks Beach, a long distance from both the Lawson and the Sabando residences, by 8:00 p.m. (T.8:780).

The whereabouts of Mr. Martinez were firmly established from 5:00 p.m. forward on October 27th. Yet Lawson and McCoy were presumptively alive at 5:01 p.m., when one of them called Sherrie's mother. The State did not contend otherwise. The only unaccounted hour is between 4:00 p.m. and 5:00 p.m. when the crimes could not have occurred, as Sherrie McCoy was alive at 5:01 p.m. Uncontradicted evidence justifying an alibi instruction was admitted. Rostano v. State, 678 So.2d. 1371 (Fla. 4th DCA 1996).

Appellee's failure to recognize this is easily understood; as its brief omits any mention of the testimony of Mr. Sabando. Yet Mr. Sabando's alibi evidence was not contested by the prosecution; cross-examination by the prosecutor did not include one question regarding the time-frames established on direct. (T.9:881-887). This attempt by Appellee to suggest that an instruction was not required because no evidence of an alibi was introduced must fail. Cf., Shells v. State, 642 So.2d. 1140 (Fla. 4th DCA 1994) (no instruction on self defense necessary where evidence was lacking).

2. The Defense of Alibi

Appellee next contends that an alibi instruction was not required, as alibi was not

the "main or sole defense" raised by Mr. Martinez. Brief of Appellee at 23. While defense counsel did generally challenge the State's evidence, Appellee declined to include the gist of defense counsel's closing argument in its brief. The defense summation transpired just over 12 pages; after quickly pointing out the problems with the audio tape, and the biases of the ex-wife and ex-girlfriend, counsel spent three pages placing Mr. Martinez elsewhere during the time of the crime advanced by the State, the essence of an alibi:

> Let's look at some of things that are undisputed and there are many things undisputed in this case.
>
> Sherrie made a phone call on Friday the 27th of October, 1996 [sic], at about noon. She talked to her sister, and there are long distance records which the State's own evidence has produced, and that is an undisputed fact. We know that she was alive.
>
> Now, what can we infer from some of the other evidence? **We also know that there was a phone call made from that residence, a long distance phone call, once again, which the testimony was placed in by the State, on 5:01 on October 27th.** Now, we have the idea that there was no connection made, nobody is home, but the fact is there was, in fact a phone call placed from that residence at 5:01, 5:01 p.m.
>
> **So now we're further narrowing down the time**. We also have testimony from Sloane Martinez that says Joe Martinez left her house maybe around four o'clock. **So that period between four o'clock and five o'clock needs to be eliminated as a time when that murder occurred**, or at least there's a reasonable doubt it didn't occur because there is that phone call going out.
>
> **And then we've got Joe at Ronnie Sabando's house anywhere between 5:00 and 5:30, according to Ronnie's testimony, and**

certainly no later than six o'clock.

Now, we've also got the testimony of Karen Keiser, the investigator, who says best she could do on a Friday afternoon, best course doing the speed limit, 23 minutes. That, ladies and gentlemen, really creates a tremendously implausible theory on the part of the Stat as to the fact that these murders occurred on October 27th during this time period between when Joe leaves Sloane's house and Joe arrives at Ronnie's. It's totally implausible.

And then from that time on, he's served some legal papers at 6:55. We know that. He arrived in Clearwater at the Dominick's house, which you know how long it take to get the Clearwater, about eight o'clock. He stays at Dominick's house until about 11:00 and stays with Laura the rest of the evening, and then he's either in contact with Laura or Leah Thomas for the rest of the day on Saturday. He's with Leah on Sunday. He picks up his car at the Dominick's on Sunday and goes to Miami, arrives at Miami later Sunday night.

Now, the medical examiner places the time of death on the 28th or beyond the 28th. He is not saying within a reasonable medical certainty. He is saying his best guess is that, and his best guess may be based on erroneous information he received outside, but he said it was further away from the time they were found than closer to it.

So if you can account for the time that is closer to the time and further away from the time, what opportunity to do we have for my client to have committed these crimes?

(T.10:981-983).

The record contains this uncontradicted evidence and testimony to support the defense of alibi. Closing argument by defense counsel clearly directed the jury to the defense of alibi, compelling the jury to find that the evidence did not allow Mr. Martinez

the opportunity to commit the crime. Yet no alibi instruction was presented to the jury concerning the low burden a defendant must show to establish an alibi and their duty to acquit if a reasonable doubt has been raised. Fundamental error, going to the foundation of the case, exists; additionally, the court had a sua sponte obligation to instruct on the defense raised by the evidence. Socher v. State, 619 So.2d. 285 (Fla. 1995); Ray v. State, 403 So.2d. 956 (Fla. 1981); Castor v. State, 365 So.2d. 701 (Fla. 1978).

B. Appellee's Response

An effort is made by Appellee to argue that "continuing investigation", rather than prosecutorial misconduct, was the reason the prosecutor kept changing the time of death. The record belies that attempt. It is true that the time of death kept evolving; the State's alibi demand filed on April 11, 1996 said the crime occurred after midnight on Saturday, October 28th; that time-frame changed on Monday of the trial week when Tina Jones changed her testimony, moving the crimes to coincide with the new version offered by Laura Babcock; the time changed one last time in the State's final closing argument to create an end-run of the Defendant's unrebutted alibi.

Even if these time movements may be categorized as "continuing investigation", the State had a duty to timely apprise the defense. See Rule 3.220(j), Fla.Crim.P. (duty to supplement discovery); Evans v. State, 23 Florida Law Weekly 2693 (Fla. 3rd DCA Dec. 9, 1998). The State wholly failed to notify the defense that Ms. Jones changed her

testimony the day the trial began.

The State implies that the defense knew of this change. This theory is flatly contradicted by the testimony at the reconstruction hearing that the defense was not advised of Ms. Jones' new recollection.[2] (S.R.2:58,84). The State moved the time of death again in its final summation to between 6:50 and 8:00 on October 27th to escape the alibi established by the defense. Clearly, this was not the result of "continuing investigation", but prosecutorial misconduct. The State advanced the new time by suggesting that the "legal papers" served by Deputy Shannon at 6:50 p.m. created an urgent need for money, i.e. child support (T.10:1018). But this was a falsehood; the "court papers" had nothing to do with money; it was a restraining order removed days later. (T.5:409). "Continuing investigation" as an excuse is inconsistent with the facts.

Finally, Appellee suggests that a new trial would be meaningless. Brief of Appellee at 25. But at a new trial:

(1) Witnesses would be deposed; Eden Dominick and Tina Jones were not, allowing for substantial modifications in their

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[2] The State argues that the failure to advise of changed testimony is not a discovery violation. Johnson v. State, 696 So.2d. 326 (Fla. 1997). Brief of Appellee at 61. Appellee fails to distinguish Neimeyer v. State, 378 So.2d. 818 (Fla. 2d DCA 1979) (failure of State to supplement new theory of coroner reversible error) and Cooper v. State, 336 So.2d. 1133 (Fla. 1976) (duty to supplement manifest in case involving human life.) There is a difference between a discovery violation which involves a witness changing testimony, and a discovery violation which results in the State moving its time frame of death when alibi is the sole defense.

testimony;

(2) Work records would be introduced to determine when Sherrie McCoy last worked, moving the time-frame again;

(3) An alibi instruction would be read to allow the jury an intelligent choice;

(4) Proper impeachment would occur; Ms. Dominick's trial testimony contradicts her police statement, and Sloane Martinez testified on deposition that Mr. Martinez left her apartment after they made love at 4:30, not 4:00 p.m.; and

(5) The numerous other errors which infected the trial would not be repeated.

The integrity of the entire process is not reliable. The trial court's obligation to properly instruct the jury, the prosecutor's obligation to strike hard but fair blows, and the defense attorney's obligation to ensure the constitutional rights of the Defendant are missing from this record.

II.

THE PROSECUTION'S USE OF A TRANSCRIPT TO SUPPLEMENT AN INAUDIBLE TAPE WHICH CONVEYED INADMISSIBLE AND HARMFUL INFORMATION TO THE JURY WITHOUT AN INSTRUCTION THAT THE TRANSCRIPT WAS NOT EVIDENCE DEPRIVED THE DEFENDANT OF DUE PROCESS OF LAW IN VIOLATION OF THE FLORIDA CONSTITUTION, ARTICLE I, SECTION 9 AND THE UNITED STATES CONSTITUTION,

AMENDMENTS VI AND XIV

Appellee has deftly avoided the issue raised concerning the State's key evidence at trial, the video tape of January 28, 1996. At trial, both parties agreed it was virtually inaudible. Its sound defect was cured by a 33 page transcript (not introduced into evidence) which convicted the Defendant. The transcript was a collaborative effort of the lead detective, the prosecutor and his secretary, and the ex-wife, first drawn from memory over six months after the event occurred. Also, the jury read the recreated transcript as if the written conversation were testimony and was not told that only the tape (and not the transcript) was evidence. This procedure violated Mr. Martinez' guarantee of due process under the Florida and federal constitutions.

Some record housekeeping to begin. Appellee advises that on January 27, 1996 "Sloane told Martinez that she knew he had killed Doug Lawson, and Martinez told her not to say things like that on an open phone." Brief of Appellee at 26. But Mr. Martinez also denied killing Lawson in that telephone call, a fact not brought out by either party at the trial.[3]

Appellee next writes that "Sloane and Detective Conigliaro later reviewed the tapes and prepared a transcript of the conversation." Brief of Appellee at 27. Actually,

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[3] Appellee also omits that part of the conversation on January 28th, where Sloane asks about the deaths, and Mr. Martinez says "I don't know if we're talkin' about the same case here or not." (R.218).

prosecutor Cox and his secretary had a hand in creating that transcript, and "later" was in June - almost six months after the conversation, allowing memories to fade. (T.13:1299-1313). Appellee makes no mention of this in its brief.

Appellee then begins recounting the conversation on the tape, Brief of Appellee at 29, but makes the same error as the prosecutor; it interchangeably refers to the conversations on the tape and the remarks contained in the transcript as if they were both admitted. The transcript was not introduced into evidence, and no single witness testified to all of the references contained therein.

Many omissions are made by Appellee which create an inherent defect in its presentation. Appellee does not include the disclaimer by Sloane, such as "I thought he could be telling a story, I wasn't sure. He gave bits and pieces. It was like a puzzle missing a lot of pieces. I wasn't sure." (T.7:579-80). Appellee also does not include the obvious lies by Mr. Martinez' to his ex-wife, such as the statement that he had to leave town, when in fact he simply wanted to avoid telling Sloane that he was moving in with his new girlfriend. Indeed, Appellee makes no mention at all about the fact that Mr. Martinez was telling stories to both his ex-wife and his current girlfriend, as neither one knew that he was being intimate with the other both the same time. Finally, Appellee asserts that Detective Conigliaro could authenticate the conversation as he was present; Brief of Appellee at 30. He was not. He was in a van down the street along with

Assistant State Attorney Karen Cox.

Florida discourages but allows transcripts to be used as an aid in understanding an audio tape. Hill v. State, 549 So.2d. 179 (Fla. 1989). But here, the transcript supplanted the tape. Even the inherently biased transcribers noted 450 inaudible remarks in the transcript, an average of 14 on each page. Appellee does not mention this. Also, over 300 remarks are attributed to Mr. Martinez on the transcript, three times the references overheard by the court reporter listening to the tape as if she were a juror. Appellee ignores this as well. Finally, those significant portions of the conversation which were highlighted by the prosecutor in his closing argument only appear in the transcript, not in the in audible tape. Appellee ignores this to advance its position.

The State is comfortable arguing that Sloane was present on January 28th, testified that the conversation was reflected in the transcript, and that ends the matter. Brief of Appellee at page 31. But Appellee fails to advise this Court that Det. Conigliaro admitted that the transcript is "not the result of one person's independent recollection but rather a cooperative effort." (T.7:600-609). The three collaborators who could not have authenticated the transcript alone were Conigliaro, the prosecutor and his secretary. Yet these three were allowed to help authenticate the transcript in violation of Florida law. See Henry v. State, 629 So.2d. 1058 (5th DCA 1994); Harris v. State, 619 So.2d. 340 (Fla. 1st DCA 1993). See also, Ortega v. State, 721 So.2d. 350, 351 (Fla. 2nd DCA

1998) (allowing policemen to interpret error as detective "was involved in the case and therefore lacked at least the appearance of impartiality that one would expect of an interpreter."). Sloane's claim that she heard everything in the transcript is flatly contradicted by the admission that three others who were not present contributed to the creation of the transcript.[4] Even Hill, supra, the case relied upon by the State to justify the transcript, forbids its use. Appellee can not seriously contend that nothing suggests that "anything was added to the transcript that was not on the tape." Brief of Appellee at 32. In fact, Mr. Martinez included an Appendix to his initial brief detailing pages and pages of references added to transcript which are not audible on the tape. See Brief of Appellant at 59, 60.

Appellee relies on the "contemporaneous objection rule" to excuse the absence of an instruction to the jury on the limited use of the transcript. Brief of Appellee at 35, 36. An instruction was clearly required. See Howard v. State, 24 Florida Law Weekly D1419 (Fla. 5DCA 1999, June 18, 1999) (transcripts permitted with proper instruction). However, between a trial court's sua sponte duty to ensure a properly instructed jury, a defense counsel's burden under the right to counsel clause in the state and federal

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[4] Appellee's use of Grimes v. State, 244 So.2d. 130 (Fla.1971) is unavailing. There, an officer present when a statement was taken was allowed to authenticate the transcript; Conigliaro was not present when this conversation between Sloane and Mr. Martinez occurred in her apartment.

constitutions, and the maxim that the law provides a remedy for all injustices, a new trial is required.

III.

THE PROSECUTOR ENGAGED IN PREJUDICIAL ARGUMENT ATTACKING THE CHARACTER OF THE DEFENDANT, UTILIZED GRUESOME PHOTOGRAPHS, OFFERED OPINIONS OF GUILT, AND KNOWINGLY ARGUED FALSE MISREPRESENTATIONS OF THE EVIDENCE WHICH DEPRIVED THE DEFENDANT OF A FAIR TRIAL IN VIOLATION OF THE FLORIDA CONSTITUTION, ARTICLE I, SECTION 9, AND THE UNITED STATES CONSTITUTION, AMENDMENT XIV

This Court's frustration with prosecutorial misconduct must be tested again on this record. The similarities and coincidences between this case and Ruiz v. State, 24 Florida Law Weekly S157 (Fla. April 1, 1999) are striking. Ruiz was also an appeal from a sentence of death in a case tried before Circuit Court Judge J. Rogers Padgett. Ruiz was prosecuted by Assistant State Attorney Karen Cox; Mr. Martinez was prosecuted by her husband. Mrs. Cox does appear on this record, however, and renders her husband an inappropriate assist. Finally, Ruiz was reversed and remanded for a new trial because of both preserved and unpreserved prosecutorial misconduct. We would submit herein that State of Florida v. Joaquin Martinez deserves the same fate.

A brief summary of those portions of the record follows which reveal a sharp

detour from established Florida law, and the inherent prejudice which ensued.

A. Opinion of Guilt Testimony and Argument

Opinion of guilt testimony is inadmissible. Lambrix v. State, 494 So.2d. 1143 (Fla. 1996). Appellee does not suggest otherwise. The prosecution elicited, over defense objection, the following:

> Q: Was there any doubt in your mind based on what he said then that he was responsible for the murder of Douglas Lawson?
> A: **There was no doubt that he did it.**

(T.7:612,613).

First, Appellee claims the error was not preserved. Brief of Appellee at 49. But defense counsel timely objected and stated "Objection. That is not a proper question." (T.7:612). The notice requirement of Castor v. State, 365 So.2d. 701 (Fla. 1978), offering the trial judge an opportunity to prevent an impropriety, was clearly met.

Next, Appellee argues that the defense invited the testimony by suggesting that the tape was inaudible and portions were out of context. Brief of Appellee at 49. This argument is a stretch; the detective was permitted to testify that he made the arrest after overhearing the January 28th conversation from a van parked down the street. (T.7:611). The door was not open to permit the officer's opinion "there was no doubt that he did it."

The opinion testimony from the detective was later bootstrapped into an opinion of guilt from Assistant State Attorney Karen Cox in a clever sleight of hand by Assistant

State Attorney Nick Cox. Mr. Cox argued in closing:

> You see, after the video tape was done, as Corporal Conigliaro told you, as he told you, Baker and **another assistant State Attorney, Ms. Cox, no one had a doubt. He was arrested because nobody had a doubt that he was guilty.**

(T.10:1012).

Appellee does not defend this remark, agreeing that it "is generally considered to be error." Brief of Appellee at 50. It counters with the failure of the defense to object as a bar to consideration of this blatant error. However, two grounds exist to allow the Court to consider this claim. First, a party need not raise an objection if to do so is a useless gesture. Birge v. State, 92 So.2d. 819 (Fla. 1957). The trial judge had already permitted this opinion of guilt testimony when it overruled the earlier defense objection. (T.7:612). The purpose of a contemporaneous objection -- to allow a judge an opportunity to prevent an impropriety -- was met by the earlier overruled objection. Second, Ruiz held that a failure to object does not permit an injustice:

> When the properly preserved comments are combined with additional acts of prosecutorial over reaching set forth below, we find that the integrity of the judicial process has been compromised and the resulting convictions and sentences are irreparably tainted.

Id., 24 FLW at S159.

B. Prosecutorial Falsehood to Establish Motive

Appellee has misunderstood this issue. The prosecution's theory was that the

murders were for money. It clearly established that Mr. Martinez was undergoing financial problems in late 1995. However, the crime scene revealed nothing was missing; a wallet was left in plain view and thousand of dollars were found in the house. A falsehood was argued by the prosecutor aimed to rectify this contradiction. A brief history is necessary.

Sloane Martinez acquired a spousal injunction against Mr. Martinez sometime in October, 1995. There was no evidence of what that petition alleged; i.e. physical abuse, harassment or unwarranted visitation. At a pre-trial hearing in this case, the prosecution and defense stipulated that the term "spousal abuse" would not be used. The prosecutor volunteered to use the term "injunction" or "court papers". (T.13:1253-54). During the trial, the prosecutor referred to the stay-away order as "court papers" or "injunction"; there was no evidence that the court order was related to money. Yet after the defense clearly demonstrated in its closing argument that Mr. Martinez could not have committed the crimes between 4:00 p.m. and 6:50 p.m. on October 27th, the State resubmitted a new time theory to the jury, a time after Deputy Shannon served the injunction at 6:50 p.m., and falsely advanced a new motive for the crime. The State argued:

> You know, does the Defendant after he leaves Sabando's house, it could have happened this way, too, the Defendant has those court papers. He needs more money. Maybe he is not real happy about those court papers he just got. So he goes over to "Michael's" house to collect. It could have happened before, it could have happened after.

(T.10:1018).

This argument was misleading, and knowingly so. First, Appellee states the prosecutor was not arguing the "court papers" created a need for money. Brief of Appellee at 43. But the language of the argument itself suggests otherwise. Second, Appellee argues the "court papers" from Sloane created stress, causing Mr. Martinez to kill. Brief of Appellee at 44. But Appellee forgets that Mr. Martinez had just left Sloane's bed; the couple made love that afternoon. Mr. Martinez surely could not have been too aggrieved by the injunction, which was lifted several days later, as he and his ex-wife had made love minutes earlier. Finally, Appellee argues that forcing the State to use the term "court papers" created confusion and Mr. Martinez can not profit from that confusion. But Appellee overlooks that the Mr. Cox stipulated he would not say "spousal abuse", and it was Mr. Cox who voluntarily agreed to use "court papers" or "injunction" during the trial. (T.13:1253-54). Quite simply, there was no excuse for the deliberate misleading of the jury. This claim exacerbated the unfairness of the trial, and tainted its integrity. Ruiz, supra.

C. The Gruesome Photographs

The final similarity between this case and Ruiz concerns the photographs introduced during the guilt phase of the trial. In Ruiz, the photo was of the corpse, and introduced during the penalty phase. Here, the photos were from the coroner's autopsy,

and introduced **over objection** during the guilt phase. This Court's finding of error in Ruiz is controlling.

The autopsy photos were hideous. The bodies had decomposed, had darkened beyond recognition, and were of no testimonial value. The trial judge found them "prejudicial and gruesome. That's for sure." (T.5:387). The prosecutor conceded that "the defense was he didn't do it". (T.10:974). With that premise, there was no relevancy to the autopsy photos (cf., self defense and defensive wounds) during the trial phase, other than to improperly influence the jury. Hoffert v. State, 559 So.2d. 1246 (Fla. 4th DCA 1990).

Appellee relies upon Henderson v. State, 463 So.2d. 196 (Fla. 1985) and Nixon v. State, 572 So.2d. 1336 (Fla. 1990) in support of the theory that gruesome photographs are permitted if relevant. Both of those cases involve defendants who confessed yet went to trial. The pictures in those cases corroborated the details within the admissions. Both cases are easily distinguishable. The autopsy photos here were inadmissible, inflammatory, and upon the objection of the defense, should have been excluded.

D. Comulative Prosecutorial Misconduct

Florida courts continue to struggle with prosecutorial misconduct. Each new case includes a recitation of earlier landmarks. See D'Ambrosio v. State, 24 Florida Law Weekly D1270 (Fla. 4th DCA, May 28, 1999). No bright line exists for when

unpreserved remarks are fundamental error. Ross v. State, 726 So.2d. 317 (Fla. 2nd DCA 1998). Two factors propel the need for a new trial here. First, the errors were both preserved and unpreserved; Ruiz allows for a consolidated review. Second, the absence of physical evidence linking Mr. Martinez to the crime, together with the inherently suspect evidence advanced (inmates, an ex-wife and an ex-girlfriend) suggest that the benefit of the doubt be resolved in favor of a new trial.

IV.

THIS COURT'S RULING IN MILLER v. STATE, 713 So.2d. 1008 (FLA. 1998), WHERE IT WAS HELD THAT AN INVITEE TO A STRUCTURE OPEN TO THE PUBLIC CAN NOT BE CONVICTED OF BURGLARY BY SIMPLY REMAINING INSIDE TO COMMIT A ROBBERY OR MURDER, MUST APPLY TO A RESIDENCE IN THIS CASE, WHERE THE STATE PROVED A CONSENSUAL AND INVITED ENTRY

This issue has undergone a subtle metamorphosis over the last few months and some history is required. However, the facts surrounding this issue are clear. Whoever entered the residence to commit the murders did so with the occupant's consent; Appellee does not contend otherwise. Also clear is that the issue of sufficiency is reviewable here. In both Miller opinions this Court reversed the burglary convictions although the opinions reveal "that Miller raises no guilt issues." Id. 24 Florida Law

Weekly S155.

In Miller v. State, 713 So.2d. 1008 (Fla. 1998), this Court sua sponte set aside a burglary conviction where Miller entered a public grocery store and a robbery/murder ensued. The holding was that no evidence was elicited to demonstrate the withdrawal of consent which is generally accorded an invitee to a public place. Id., 713 So.2d. at 1010. Miller was revised in an opinion filed on April 1, 1999. Now, consent is a complete defense to the charge of burglary if an accused can show that the premises were open to the public. Id., 24 Florida Law Weekly at S155. Left open is the case here; where the premises are private, but consent has been established, what standard must the State establish to demonstrate a withdrawal of consent?

The language from the first Miller opinion remains persuasive; "there must be some evidence the jury can rationally rely on to infer that consent was withdrawn besides the fact that a crime occurred." Id., 713 So.2d. at 1011. Indeed, the Miller I language has already been approved in McCoy v. State, 723 So.2d. 869, 870 (Fla. 1st DCA 1998), where the court set aside a burglary conviction where McCoy entered a house for business purposes, received consent to use the bathroom, then exposed himself. Although the victim expressly testified that she did not consent to the crime, the Court held that "consent was not withdrawn explicitly or by the victim's actions . . . [and] where. . . the only evidence that the victim withdrew consent is that the Defendant

allegedly committed the crime in the dwelling, the evidence is insufficient as a matter of law to establish burglary." McCoy, 723 So.2d. at 870.

This Court must follow the rationale in its earlier holding in Miller I, and on the facts of this case, set aside the burglary conviction. Inherent in that ruling is a vacating of the death sentence, where the concurrent crime of burglary was utilized by the jury and the court to aggravate the sentence to death.

V.

THE FAILURE OF THE STATE TO ABIDE BY ITS DUTY TO SUPPLEMENT DISCOVERY UNDER FLA.R.CRIM.P. 3.220(j) DEPRIVED THE DEFENDANT OF A FAIR TRIAL IN VIOLATION OF THE FLORIDA CONSTITUTION, ARTICLE I, SECTION 9 AND THE UNITED STATES CONSTITUTION, AMENDMENT XIV

Appellee renews its defense of this fundamentally flawed trial with the assertion that errors are forgiven when there is "overwhelming evidence of guilt, including Martinez' own admissions of guilt." Brief of Appellee at 60. That statement requires examination.

Missing from its brief is Appellee's concession that the hundred of pieces of physical evidence inspected by forensic experts failed to link Mr. Martinez to the crime. (T.80:860). That the tape created by the ex-wife did not include direct admissions of

guilt; only the unadmitted transcript drawn by the prosecution did. That the "admission" Appellee refers to is a statement by Mark Richey, [5] an inmate who claimed to have received no benefit from the State yet received (notwithstanding five felony convictions) probation after his testimony.(T.8:677-687). That even the testimony of Laura Babcock, which linked Mr. Martinez to Doug Lawson on October 27th, did not include a confession; she only allowed that Mr. Martinez told her that he fought with Michael/Doug over money and left after grabbing a bag of marijuana. (T.8:793-798).[6] That Mr. Martinez established and proved an alibi. The evidence was not overwhelming, nor was his admission compelling.

The State next offers the theory that the defense did not object to these discovery violations because it was aware of the changed testimony. Brief of Appellee at 60. While the defense was on notice that Eden Dominick had new testimony, the lawyers did nothing. But the record flatly contradicts the assertion that the defense knew Tina Jones had changed her testimony. Neither the prosecution nor defense counsel who testified

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[5] That statement bears brief examination; Mr. Richey testified he asked the Defendant if he did it, and Mr. Martinez allegedly told this stranger "yes". (T.867). That was all; no details, no confidences exchanged - nothing.

[6] The weight of this evidence is burdened by (1) Ms. Babcock's silence for over a year, until told of Mr. Martinez' unfaithfulness, (2) the omission of any reference to Ms. McCoy, and (3) that a wallet and jewelry were seen in plain view in the house, so theft was not apparent as a motive.

at the recreation of the record hearing recalled any discovery supplementation about Tina Jones. (S.R.2: 58,84).

1. Eden Dominick

Ms. Dominick was interviewed by police days after the murders and offered nothing of substance. Ms. Babcock, her best friend and the Defendant's fiancé, told the prosecutor the weekend before trial of a new version of October 27th, and the defense asked to delay the trial to depose Ms. Babcock. No similar request was made of Ms. Dominick, although the State knew that she had new testimony to offer at trial and failed to disclose this to the defense. When Ms. Babcock was deposed, she made references to Ms. Dominick.

Appellee contends that the Babcock deposition put the defense on notice that Ms. Dominick was changing her testimony. Appellee is correct in one regard; while the deposition may absolve part of the prosecutor's discovery error, it does not validate the procedure. First, Ms. Dominick went further at trial than Ms. Babcock's deposition implied -- the defense was not apprised that Ms. Dominick would claim that Mr. Martinez appeared to have been in a fight. Second, mitigation of the prosecutors error only highlights the blunder of defense counsel; **Ms. Dominick was never deposed, even**

after Ms. Babcock's reference to her in the deposition.[7]

Any concession here only enhances the ineffective assistance of counsel argument made in Point VI herein.

2. Tina Jones

Appellee does little to excuse this blatant discovery violation. It suggests that the defense knew Ms. Jones was wrong about when she last spoke with her sister. Then, Appellee suggests that a change in testimony is not a discovery violation. Brief of Appellee at 61-65.

Ms. Jones' testimony was critical. The medical examiner expressed his time of death estimate based upon her statement that she spoke with her sister Saturday afternoon. When the court ordered the State to answer a bill of particulars, the State relied on Ms. Jones' recollection to make a time specific demand for a notice of alibi. (T.13:1389; S.R.2:4). The State was set to prove the crime occurred after Saturday until Laura told the prosecution the weekend before trial that it may have occurred Friday afternoon. This new evidence forced the re-examination of Ms. Jones' recollection. Ms. Jones changed her testimony the Monday of the trial week. (T.7:654, 655).

Appellee implies that the defense knew this would occur as an excuse for the

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[7] More curious, where was Tom Dominick? Would he corroborate or impeach his wife and Ms. Babcock?

discovery violation. First, the State objected to any inquiry into this area at the reconstruction hearing ordered by this Court. Nevertheless, prosecutor Cox and defense counsel did testify at that hearing that the State never spoke with the defense of Ms. Jones' new testimony. (S.R.2:15-33). This testimony flatly contradicts Appellee's theory. In any event, even if everyone -- including the defense -- thought Ms. Jones was mistaken, it was nevertheless incumbent upon the State to advise the defense that Ms. Jones was prepared to admit her error at trial. See Rule 3.220(j) Florida Rules of Criminal Procedure.

3. Changed Testimony and the Duty to Supplement Discovery

Appellee contends that the State is not under an obligation to advise the defense under Rule 3.220(j)'s duty to supplement discovery when a witness changes his or her testimony. See Johnson v. State, 696 So.2d. 326 (Fla. 1997); Bush v. State, 461 So.2d. 936 (Fla. 1980). While Bush does dispense with the argument by allowing the jury to reconcile the issue, Johnson reveals that a Richardson hearing was held on the violation and the witness was not changing her testimony at all. Id., 696 So.2d. at 333. There is no relationship between those cases and Ms. Jones changing her testimony.

More significantly, those cases are inconsistent with the cases which note the significance of new evidence which affects the defense theory. See Barrett v. State, 649 So.2d. 219 (Fla. 1994) (new fingerprint comparison must be revealed) Neimeyer v.

State, 378 So.2d. 818 (Fla. 2nd DCA 1979) (failure to advise defense of coroner's new theory negating self-defense reversible error). The record fails to negate the existence of a substantial discovery error; time of death was highly relevant. Tingley v. State, 549 So.2d. 649 (Fla. 1989). A notified defense could have re-examined work records, deposed Ms. Jones, or reacted with different alibi witnesses to deal with the new time-frames. The State has not overcome the sense of unreliability which emanates from this record.

VI.

IN THE UNIQUE CIRCUMSTANCES OF THIS CASE, WHERE TRIAL COUNSEL'S INEFFECTIVENESS IS APPARENT FROM THE RECORD, THE DEFENDANT WAS DENIED HIS RIGHT TO COUNSEL AND A FUNDAMENTALLY FAIR TRIAL IN VIOLATION OF THE FLORIDA CONSTITUTION, ARTICLE I, SECTIONS 9 AND 16, AND THE UNITED STATES CONSTITUTION, AMENDMENTS VI AND XIV

As a court of last resort, this Court must balance several ingrained legal principles: an obedience to precedent, a duty to accommodate new law, and an obligation to render justice. Mr. Martinez received ineffective of counsel, an issue generally reserved for collateral attack. Wuornos v. State, 676 So.2d. 972 (Fla. 1996). But no trial tactic can justify a defense which proves an alibi, argues alibi in summation, yet fails to request an

alibi instruction. Indeed, no credible explanation would suffice if, as requested by Appellee, an evidentiary hearing were held on remand to question defense attorney regarding this lapse.

This Court has seen ineffective assistance of counsel and has reversed cases on direct appeal. It is curious that Appellee's brief does not include Robinson v. State, 702 So.2d. 213 (Fla. 1997). Mr. Robinson received ineffective assistance of counsel -- his lawyer did not prepare for trial, lied to the jury, offered no evidence in mitigation and was improperly compensated. The lawyer's performance was exacerbated by his relationship to the judge, who was subsequently indicted for perjury. This Court cut to the quick and held that "the credibility and integrity of the judicial process requires a new trial." Id., 702 So.2d. at 217. Later, in Ruiz v. State, supra, this Court again dealt with unpreserved errors for which no strategy reasons existed for non-objections by noting "that the integrity of the judicial process has been compromised and the resulting convictions and sentences irreparably tainted." Id., 24 Florida Law Weekly at S159.

An inherent reliability in the proceedings is absent. This jury was allowed to hear that the police and a prosecutor had no doubts of guilt; that Mr. Martinez did not support his children and was unfaithful to his pregnant wife; this jury was allowed to read a supplemental transcript of an inaudible tape, replete with inadmissible references. Even worse, this jury heard alibi evidence, alibi argument, but no alibi instruction. This jury

did not know that Mr. Martinez did not have to prove his alibi beyond a reasonable doubt; that if he merely raised a doubt, which the State did not overcome, they must acquit.

Appellee's defense of these failures is not persuasive. It mostly cites cases holding that a failure to object is usually a trial tactic. See Anderson v. State, 467 So.2d. 781 (Fla. 3rd DCA 1985). It distinguishes the three cases which compel a reversal as "wrongly decided". Brief of Appellee at 74, referring to Gordon v. State, 469 So.2d. 795 (Fla. 4th DCA 1985); Owen v. State, 560 So.2d. 207 (Fla. 1989); Ross v. State, 726 So.2d. 317 (Fla. 2nd DCA 1998).

Appellee's weakest rebuttal is an attempt to excuse the absence of a request for an alibi instruction as a trial strategy. The State argues that counsel may have wanted to avoid the "limiting portion of the instruction before them." Brief of Appellee at 81. But Instruction 3.04 has no disadvantage or limiting portion; it compels an acquittal if a defendant raises a reasonable doubt as to whether he was present at the crime scene. Here, where no physical evidence linked Mr. Martinez to the crime scene and his alibi witnesses were the unimpeached Ronnie Sabando and Deputy Shannon, there was no down-side to the instruction.[8]

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[8] Appellee suggests that counsel may have wanted to avoid the instruction because of the evidence Mr. Martinez asked Sloane to be his alibi witness. This was not evidence -- it was in the transcript, not the tape. Appellee, like the jury, confuses the two.

The integrity of the process is tainted by the actions of the prosecutor, the inactions of defense counsel, and the failure of the trial judge to ensure a fair trial. See Borden, Inc. v. Young, 479 So.2d. 850, 851 (Fla. 3rd DCA 1985) (Schwartz) ("it is no longer - if it ever was - acceptable for the judiciary to act simply as a fight promoter, who supplies an arena in which parties may fight it out on unseemly terms of their own choosing."). A new trial is warranted.

VII.

FLORIDA'S CAPITAL SENTENCING STATUE IS UNCONSTITUTIONAL

Mr. Martinez attacked the constitutionality of Florida's capital sentencing scheme in this point. Appellee argues that existing precedent rebuts that challenge. Mr. Martinez would rely on his initial brief on this issue.

VIII.

THE PENALTY PHASE AND THE SENTENCING PROCESS INCLUDED VARIOUS ERRORS WHICH RENDERED THE PROCESS UNFAIR IN VIOLATION OF FLORIDA LAW AND THE UNITED STATES CONSTITUTION, AMENDMENTS V, VI, VIII AND XIV

Mr. Martinez would rely on his initial brief on this Point.

IX.

IMPOSITION OF THE DEATH PENALTY IN THIS CASE IS DISPROPORTIONATE, WHERE THE

DEFENDANT PROVED CONSIDERABLE MITIGATING CIRCUMSTANCES AND THE FACTS SURROUNDING THE HOMICIDES REMAIN UNCLEAR

Mr. Martinez argued in his initial brief that death was an inappropriate sentence because of unique features of this case. Appellee has either declined to discuss those facts, or has inappropriately distinguished those circumstances.

1. The Burglary

Elevation of a passionate killing from second degree murder to first degree murder by the legal fiction of presumed withdrawal of consent is a legal landmine. Appellee cites thirty cases (out of thousands) over a twenty year period for the proposition that murders happen out doors. Brief of Appellee at 84, 85. This misses the point; how many second degree prosecutions will now become first degree felony murder prosecutions through this legal fiction? How many first degree murder prosecutions, absent premeditation, will survive through this device?

The State's theory was that Mr. Martinez was invited into the Lawson home, a fight erupted over money, and the murders occurred. Utilization of the burglary statute stands the purpose of the law -- unlawful entry -- on its head. Entry was consensual. Moreover, it is nonsense to suggest a killer "remains" to commit the crime; in fact, a perpetrator rarely remains at all, but flees immediately. The "remains" provision of the burglary statute was included to allow prosecution of lawful invitees who hide inside a

store past closing time to commit a theft.

Enhancement of the conduct set forth in this evidence through the legal fiction is troublesome on these facts as well. The only inkling of what occurred inside the Lawson residence came into evidence obscurely. Sloane testified that Mr. Martinez told her Lawson "threatened me" and "was going to physically harm him." (T.6:548). Police determined nothing was taken from the residence which evinced a theft. Laura Babcock only offered that Mr. Martinez said he took a bag of pot when he was leaving the residence. (T.8:793). Even the trial judge refused to instruct the jury on murder for pecuniary gain, observing that the evidence established no reason or motive for the killings. (T.11:1053).

The notion that Joaquin Martinez may die in the electric chair on these facts is abhorrent. The evidence does not compel the finding that he was the killer. The evidence reveals a fight erupted over a debt, which led to a deadly result. There was no evidence that the killer brought a weapon to the scene, or acted once inside with a premeditated design to kill, as opposed to in reaction to a provocation. If the testimony of Ms. Dominick and Ms. Babcock are heeded, Mr. Martinez had wounds to his face; whether he was initially the attacker or the victim is not known. Death is not an acceptable outcome when so much is in doubt.

2. Proportionality

The trial court found nine separate mitigating factors were established by the evidence. The Court found that Mr. Martinez had no significant history of criminal activity, an excellent family background as a loving religious son who was of great help to his legally blind father and the elderly and the poor, an able, generous, "wonderful father" to his two young daughters, that he suffered from depression and disorientation as a result of an automobile accident which left him in need of counseling, that he had a reputation for being a hard worker, aversion to violence, that he would adjust well to prison, and that his ex-wife had asked that his life be spared to enable her and their two daughters to maintain a relationship. Moreover, psychological testing was introduced that Mr. Martinez was an intelligent man with a healthy personality and is neither a sociopathic nor a psychopathic. (R.2:332-335). In contrast, the aggravating factors were far less compelling. Two were legally required: the contemporaneous violent felony against Mr. Lawson and the burglary. The burglary, as discussed herein, is suspect. The contemporaneous violent felony against Mr. Lawson also must draw re-examination, in light of the wounds to Mr. Martinez and the fact that the evidence suggested that Lawson may have threatened Mr. Martinez.

This Court is bound to review the facts of this case for proportionality, and determine whether, on the basis of what is known, and more importantly, on the basis of what is not known, Mr. Martinez must suffer the ultimate penalty for this crime. The

considerable mitigating factors enure against the death penalty in this case.

CONCLUSION

Mr. Martinez would reiterate this request for a new trial on the grounds set forth in his initial and reply briefs.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was mailed this __ day of July, 1999 to: **CLERK OF THE COURT**, Florida Supreme Court, Supreme Court Building, 500 South Duval Street, Tallahassee, Florida 32399-1925; **MS. CAROL M. DITTMAR**, Counsel for Appellee, Assistant Attorney General, Office of the Attorney General, 2002 North Lois Avenue, Suite 700, Westwood Center, Tampa, Florida 33607; **MS. SHARON KEGERREIS,** c/o Hughes, Hubbard & Reid, 201 South Biscayne Blvd., Suite 2500, Miami, Florida 3313; and **MR. JOAQUIN MARTINEZ**, Reg. No.: 124396, c/o Florida State Prison, P.O. Box 181, Starke, Florida 32091-0747.

Respectfully submitted,

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