IN THE SUPREME COURT OF FLORIDA

RONALD R. CARDENAS, JR.

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

_____/

A Petition for Review of a Question Certified by the First District Court of Appeal to be of Great Public Importance

PETITIONER'S INITIAL BRIEF

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PREFACE

The parties shall be referred to by name, or by their most descriptive roles in these proceedings. Usage will be governed by the goal of maximum clarity.

One caution is in order. Three members of the petitioner's family, all with the Cardenas name, were aboard the ill-fated boat when the accident giving rise to this case happened. All use of the "Cardenas" name shall refer to the petitioner, unless expressly stated otherwise.

This brief will use the citation standards prescribed in Fla.R.App.P. 9.800. With the intent of being as consistent with Fla.R.App.P. 9.800 as possible in all citation, the following additional citation formats will be used.

(X. R. y)	Cites to volume "X", page "y" of the Record on Appeal. Line numbers may be added, if appropriate, in the same manner as in a citation to the trial transcript.
(X. T. a/b)	Cites to volume "X", page "a", line "b" of the transcript of trial.

POINTS FOR REVIEW

I. IS IT FUNDAMENTAL ERROR TO GIVE A JURY INSTRUCTION ON THE PRESUMPTION OF IMPAIRMENT IN VIOLATION OF THE PRECEPTS OF *STATE v. MILES*, 775 So. 2d 950 (FLA.2000)?

II. WHETHER THE PROSECUTOR'S REPEATED IMPROPER COMMENTS IN CLOSING ARGUMENT WERE SUFFICIENTLY DAMAGING TO REQUIRE REVERSAL OF MR. CARDENAS' CONVICTIONS IN AND OF THEMSELVES, OR WHERE IT IS MOST PROBABLE THAT THEY SIGNIFICANTLY CONTRIBUTED TO THE POTENTIAL CONFUSION OF THE JURY, THUS MAKING THE CASE EVEN CLOSER THAN IT WOULD OTHERWISE HAVE BEEN, IN TURN, MAKING THE ERRONEOUS JURY INSTRUCTION EVER MORE CRITICAL.

STATEMENT OF THE CASE AND FACTS[1]

On the evening of October 29, 1995 a tragic boating accident happened in the waters of Escambia County, Florida. A 22' sport fishing boat, owned by the appellant, collided head-on with a barge. Five persons were aboard the ill-fated vessel, including the petitioner, Ronald R. Cardenas, Jr. Mr. Cardenas has constantly maintained that he was not the driver at the time of the accident, yet he was found guilty of four charged offenses and one lesser included offense. The jury obviously believed that Mr. Cardenas was the operator of his boat at the time of the accident. (III. R. 501-503).

Immediately after the accident, rescue operations began. At the same, the investigating officers decided to begin investigation of the case as a criminal matter. (VI. T. 1118/7-24).

In the minutes following the incident, law enforcement began contact with Mr. Cardenas. After he was brought to land, Mr. Cardenas was approached by law enforcement personnel from the FMP. (VI. T. 1118/7-24). At this time, he was suffering from obvious injuries, including two large and bleeding lacerations to his face, broken ribs, a laceration to the back of his right hand, multiple fragments

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[1] This statement is a heavily modified version of that provided in the initial brief on appeal. It has been adapted to reflect the issues as presently presented.

of broken glass embedded into his feet, and numerous other lesser injuries. (IV. T. 704/14 - 710/6).

Later that evening, at the hospital, Mr. Cardenas was questioned by two FMP officers simultaneously. From trial testimony, it appears that the primary interrogator was one Lieutenant Harry "Buddy" Gomez, while Officer Patricia Webb also participated. (V. T. 866-868). Although Mr. Cardenas indicates that he was never read his "Miranda" rights, the officers indicated that they did. (V. T. 867/2).

It was during this at-the-hospital interrogation that Mr. Cardenas allegedly made an important admission: that he had been driving the boat at the time of the accident. (V. T. 868/16). Most interestingly, however, Officer Webb, who was also present during the entire interrogation, ***testified that Mr. Cardenas made no such admission***. (VI. T. 1128/3-7).

Following this interrogation, both officers prepared reports of detailing their recollections of, among other things, their interrogation of Mr. Cardenas. ***Neither FMP officer reported or recorded that Mr. Cardenas had admitted to driving his boat at the time of the accident***. (V. T. 869-889).

In addition to the voluminous factual testimony presented at trial, the State also presented significant DNA evidence. (IV. T. 670-702). Both immediately after the accident, and again several days later, the investigating officers directed that

agents of the FDLE secure as much blood evidence from the ill-fated vessel as they could. Id. In addition, investigators secured comparison blood samples from each of the five persons who had been aboard at the time of the accident. All of these blood collections were DNA tested, and the results cross-checked. (IV. T. 683-696).

It was undisputed at the trial that during the accident, the Mr. Cardenas suffered several severe lacerations to his face (IV. T. 714/5-6), and that these injuries would have been bleeding heavily upon infliction. (IV. T. 714/23 - 715/1). Mr. Cardenas also had several fish hooks and pieces of broken glass become embedded in the sole of his foot. Despite this, the prosecution's own DNA testing, ***revealed that none of Mr. Cardenas' blood was left in the vicinity of the helm of the boat, or anywhere else along the trajectory which the state's accident reconstruction expert testified that Mr. Cardenas was thrown***. (IV. T. 641/8 - 653/5, IV. T. 683-696).

Amongst the other important testimony presented at trial was that of the expert witnesses of each side. The prosecution retained and called at trial Dr. William Chilcott, Ph.D., a marine accident reconstructionist. (IV. T. 729/2-4). He testified that Mr. Cardenas was driving the boat at the time of the accident. The defense retained and called at trial Dr. Clarence Nicodemus, a bio-mechanical engineer who testified that Mr. Cardenas could not have been operating the boat at

the time of the accident. With this, and the rest of the evidence presented, this was an extraordinarily close case.

During closing arguments, the prosecutor repeatedly violated Mr. Cardenas' due process right to a fair trial, the Rules of Professional Conduct, and the rules prohibiting denigration of an opponent and his defenses, expressing personal opinions, and violating orders in limine. Many of these errors alone, but certainly all viewed together call for a new trial. More to the point, these pervasive errors created such a distorted picture for the jury, that the erroneously given instruction became far more critical than it might otherwise have been. Thus, this issue may and should be considered by this Court, although it is not explicitly part of the Certified Question. Burks v. State, 613 So.2d 441(Fla. 1993).

SUMMARY OF ARGUMENT

The trial court gave the jury the standard instruction concerning the presumption of impairment. At the time, this was required by existing case law. Miles v. State, 732 So.2d 350 (Fla. 1st DCA 1999) (Miles I). Despite this, trial defense counsel did object to the instruction, although his objection did not specify that it was based upon the rationale which would not be approved by this Court for another six months. State v. Miles, 775 So.2d 950 (Fla. 2000) (Miles II). In that decision, this Court decided that if the State admits blood alcohol through the traditional predicate (as was done here), there could be no presumptions of impairment. Id. Thus, in this case, the State was entitled to no presumption instruction, and its giving was error.

On direct appeal, the District Court rejected the appellant's argument that because of the erroneous instruction in a close case, a new trial was warranted. The District Court did, however, certify the following question for this Court:

> **IS IT FUNDAMENTAL ERROR TO GIVE A JURY INSTRUCTION ON THE PRESUMPTION OF IMPAIRMENT IN VIOLATION OF THE PRECEPTS OF *STATE v. MILES*, 775 So. 2d 950 (FLA.2000)?**

The petitioner respectfully submits that this Court should answer this question in the affirmative and order a new trial. The error involved was preserved as well as it could have been, and no more specific error had any chance of altering

the trial court's decision to give the instruction, since then-existing law required it. Miles I. This error was fundamental, thus reversible, since the error invited the jury to reach a presumptive conclusion on a key issue in an extraordinarily close case.

Mr. Cardenas also respectfully submits that numerous improper arguments by the prosecutor during summation also require a new trial, although the District Court did not address this briefed issue in its decision. These errors significantly contributed to the closeness of this case, and likely destabilized the truth-seeking function of the trial, making the challenged jury instruction even more critical.

In particular, Several comments violated the rules against denigrating the defense and its counsel. Briggs v. State, 455 So.2d 519 (Fla. 1st DCA 1984). Several others violated the rule that lawyers not express personal opinions or make unsupported arguments before the court. Redish v. State, 525 So.2d 928 (Fla. 1st DCA 1988). Finally, the prosecutor also violated a stipulated order in limine while simultaneously misrepresenting the testimony of a key witness for both the prosecution and the defense (David Pittman). Houghton v. Bond, 680 So.2d 514 (Fla. 1st DCA 1996).

ARGUMENT

FIRST POINT ON REVIEW

(QUESTION CERTIFIED BY THE DISTRICT COURT)

IS IT FUNDAMENTAL ERROR TO GIVE A JURY INSTRUCTION ON THE PRESUMPTION OF IMPAIRMENT IN VIOLATION OF THE PRECEPTS OF *STATE v. MILES*, 775 So. 2d 950 (FLA.2000)?

For several reasons, this Court should answer the question in the affirmative.

A. Preservation.

As the dissent below succinctly points out, the majority's focus upon the non-specificity of trial defense counsel's objections to the subject instruction is, with all due respect, illogical. Notably absent from the District Court's opinion is any suggestion or description of an actual circumstance under which a more specific objection to the instruction might have persuaded the trial judge to refrain from giving the challenged instruction.

At the time of the trial, the trial judge was compelled by the existing law to give the subject instruction. Miles I. No degree of specificity in the objection made would or could have altered the judge's determination to give the instruction, assuming as we must, that the trial judge would have followed the then-existing law. Therefore, any further instruction would have been an utterly futile, useless gesture

having ***no chance whatsoever*** of actually obtaining the specifically requested alternative (no presumption instruction).

In many other areas of law, including some closely related to the situation in this case, Florida courts have repeatedly refused to require lawyers to engage in futile gestures. For example, where the trial court ***overrules*** an objection to point that if ***sustained*** might warrant a mistrial, the objecting lawyer is not required to make the futile motion for mistrial to preserve the issue for review. Aerolineas Argentinas S.A. v. Gimenez, 807 So.2d 111 (Fla. 3d DCA 2002); Flour Enterprises, Inc. v. Tri-City Electrical..., 784 So.2d 1260 (Fla. 5th DCA 2001); Gonzalez v. State, 777 So.2d 1068 (Fla. 3d DCA 2001). This general principle arises in a wide variety of cases.

In this case, the law compelled the giving of the subject instruction, regardless of how specifically defense counsel might have objected to it, so, just as surely as a judge who has overruled an objection would deny a motion for mistrial, the trial judge in this would and could only have rejected even a more specific objection, and would and could only have given the subject instruction.

In another analogous situation, this Court has explicitly condemned what it characterized as "charades in trial". In Dosdourian v. Carsten, 624 So.2d 241 (Fla. 1993), this Court stated that it was taking a "strong stand" against charades in trial. In Dosdourian, the "charade" involved permitting the parties to portray a tort case

in a misleading way through the use of so-called "Mary Carter" agreements, which distort the truth through concealing partial settlements between colluding former adversaries.

The rationale of the Dosdourian case was extended into the context of uninsured motorist (UM) insurance cases in which the UM carrier attempted to portray itself in some role other than that which it really occupied, in order to cast itself in a more favorable light before the jury. Lamz v. GEICO, 803 So.2d 593 (Fla. 2001); Medina v. Peralta, 705 So.2d 703 (Fla. 3d DCA 1998).

Obviously, the specific evil addressed in Dosdourian and its progeny was somewhat different than that alleged by the petitioner in this case. Those cases address the problem of taking deceptive positions that will likely mislead jurors, or more broadly, that threaten the integrity of the jury system. See Allstate v. Boecher, 733 So.2d 993 (Fla. 1999) (citing Dosdourian).

While judges in Florida are an able group, like the rest of humanity, they too may be misled. The District Court's position in this case encourages lawyers to engage in misleading "charades" before trial courts. Under this holding, lawyers must make pointless and legally unsupported objections, if there is any likelihood that the issue involved might be subject to later review, on the chance that the law might change in their favor in the future. To the extent that lawyers succeed with

such baseless objections, that success must be the result of a misled or mistaken trial judge. Encouraging such a dynamic is hardly a desirable goal.

Obviously, the operative facts of this case are different from the line of "Mary Carter" and concealed UM carrier cases. On the other hand, there is a striking equitable parallel between this case and those lines of cases. In this case, the majority decision in the court below would essentially require trial defense counsel to have engaged in the deceptive charade of making a baseless objection which was not then supported by law, as if it had some chance of actually working. On the other hand, ***everyone involved***, the trial judge, defense counsel, the prosecutor, and the three honorable judges of the District Court, ***all*** understood that there was no further objection possible which would have had any chance of properly changing the trial judges decision to give the presumption instruction.

In reaching its holding, the District Court also overlooked the very purpose of making timely and specific objections. Objections at trial are not meaningless rituals or incantations. Rather, the prime reason for requiring timely, specific objections is to apprise the trial judge of an incipient error and to allow the trial court, which is in the best position to prevent error and control damage, to correct a situation before it rises to the level of reversible error. Franqui v. State, 804 So.2d 1185 (Fla. 2002); A.F. v. State, 718 So.2d 260 (Fla. 1st DCA 1998); Norton v. State, 709 So.2d 87 (Fla. 1998). This purpose is simply not implicated here,

where the allegedly required objection could not, at the time of trial, have led the trial judge to any other decision than the one he reached. Where its purpose is not implicated, the contemporaneous objection rule need and ought not be enforced. A.F. v. State, *supra*.

B. Did the Challenged Presumption Instruction "Merely Advise the Jury of an Evidentiary Presumption..."?

In its opinion, the District Court founded part of its fundamental error analysis upon the specific assertion that the "challenged instruction merely advised the jury of an evidentiary presumption or permissible inference that they were free to accept or reject. See State v. Rolle, 560 So.2d 1154, 1156 (Fla.1990); Register v. State, 582 So.2d 762, 763 (Fla. 1st DCA 1991)". Cardenas v. State, 816 So.2d 724 (Fla. 1st DCA 2002).

With all due respect, this statement is a form of circular logic which effectively translates into "the instruction is not fundamental error because we say it is not fundamental error." ***This*** Court has ruled that when a blood test is admitted outside the confined of the implied consent system, there is to be no presumption instruction. Miles II. Thus, as this Court has since clarified, the challenged instruction ***wrongfully*** advised the jury of an evidentiary presumption or permissible inference that they were ***not*** free to accept or reject. So, far from "merely advising"

the jury, this instruction incorrectly invited a presumptive finding upon a key element of this serious felony case.

C. **Was Giving the Presumption Instruction Fundamental Error?**

The opinions which form the backbone of the District Court's finding of no fundamental error are not applicable on the facts of this case. None of these cases involves a situation in which the trial court gave what turned out to be a completely unsupported instruction, which also invited a presumptive finding upon a key element of the charged offense. For example, in State v. Delva, 575 So.2d 643, 644-45 (Fla. 1991), this court addressed a situation in which the instruction given at trial, was later held to be merely ***defective*** by this Court. State v. Dominguez, 509 So.2d 917 (Fla. 1987). In that case, an instruction was given, but was later deemed defective because it simply lacked the element of knowledge, later held essential in Dominguez, but not objected to by Dominguez.

This case is different. Here, a wholly erroneous instruction was given where in fact, none should have been given. Moreover, the instruction went to the heart of a key issue (impairment in a BUI Manslaughter case), and not to a secondary or trivial point.

The other cases relied upon by the Court below all involve fundamentally different situations in which the complaining defendant argued either that some ***defect*** in a given instruction should be cause for a new trial, or that an otherwise

necessary instruction was ***not*** given. Archer v. State, 673 So.2d 17, 20 (Fla. 1996) (defendant claimed that valid standard instructions to resentencing jury failed to properly apprise jury of the meaning of reasonable doubt–not fundamental error); Geralds v. State, 674 So.2d 96, 98-99 (Fla. 1996) (defendant not entitled to instruction directing jury not to consider non-violent felonies where defendant himself brought those to jury's attention and ultimately, the omission would be harmless in an overwhelming 12-0 death case); Tolbert v. State, 679 So.2d 816 (Fla. 4th DCA 1996) (defendant failed to specifically object to jury being instructed on permissive lesser included offense waived challenge to conviction where one element of LIO not charged in information–again not fundamental). These are all far less compelling situations than one in which no instruction should have been given, and the one that was invited a presumptive finding on a key element of the case.

Finally, the petitioner respectfully submits that the District Court wholly overlooked the fact that the "closeness" of a case is relevant, although not exclusively so, to the question of whether an error is fundamental. As disputed issues become closer and closer, it becomes easier and easier for errors to reach down to and affect the foundation of a fair trial. Baillie v. State, 782 So.2d 435 (Fla. 2d DCA 2001); Miller v. State, 782 So.2d 426 (Fla. 2d DCA 2001) (essentially a more detailed twin of the preceding, each arising from the infamous stolen stop sign

case); Ratley v. Batchellor, 599 So.2d 1298 (Fla. 1st DCA 1991); Tuff v. State, 509 So.2d 953 (Fla. 4th DCA 1987); Ryan v. State, 457 So.2d 1084 (Fla. 4th DCA 1984).

This was a case in which the jury could easily have gone either way. The record is replete with information which could just as easily have supported a not guilty verdict. The defendant denied he was driving. His biomechanical engineer testified he was not, and further, that victim Parrish had injuries consistent with his having been the driver. Although cut and immediately bleeding from his injuries, none of Mr. Cardenas' DNA was found in any of the many blood samples taken in the areas where the state's engineer indicated Mr. Cardenas' body had been thrown during the accident. And Mr. Cardenas' alleged admissions to driving were never reported or recorded until after victim Parrish's wife had sold a boat to one of the investigators at a discount, and with interest-free financing. Thus, with virtually every material fact in legitimate dispute, the jury was wrongfully directed to presume one of the key foundational elements of this BUI Manslaughter case.

SECOND POINT FOR REVIEW

WHETHER THE PROSECUTOR'S REPEATED IMPROPER COMMENTS IN CLOSING ARGUMENT WERE SUFFICIENTLY DAMAGING TO REQUIRE REVERSAL OF MR. CARDENAS' CONVICTIONS IN AND OF THEMSELVES, OR WHERE IT IS MOST PROBABLE THAT THEY SIGNIFICANTLY CONTRIBUTED TO THE POTENTIAL CONFUSION OF THE JURY, THUS MAKING THE CASE EVEN CLOSER THAN IT WOULD OTHERWISE HAVE BEEN, IN TURN, MAKING THE ERRONEOUS JURY INSTRUCTION EVER MORE CRITICAL.

This point was not explicitly certified for review by the District Court. Petitioner believes it is still ripe for review since the comments described were sufficiently egregious that they likely played a significant role in the jury's deliberation. With an already close case, the effect of these comments, ***combined*** with the improper presumption instruction created a situation in which it can not be shown that the errors involved did not affect the verdict. In short, it is likely that the combined effect of heavily distorting argument with an improper presumption instruction remove any confidence that the verdict in this case was well or properly founded. Since this Court should examine the overall effect of the errors involved on the jury, this issue is also reviewable. See Burks v. State, 613 So.2d 441(Fla. 1993).

On several occasions, the prosecutor indulged in seriously improper argument during his summation. Some of these arguments drew objections, while

others did not. Some of these comments taken by themselves, either approach or equate to fundamental error, which should justify a new trial, even absent an objection. On the other hand, the cumulative effect of all of these comments together sufficiently tainted the trial, that a new trial is warranted regardless of the objections made during the arguments.

a. The prosecutor repeatedly expressed personal opinions not supported by record evidence, made untrue statements of the evidence, or both.

It is clear under Florida law that lawyers are not permitted to express their own personal opinions concerning a case during closing arguments. Lewis v. State, 780 So.2d 125 (Fla. 3d DCA 2001); Redish v. State, 525 So.2d 928 (Fla. 1st DCA 1988); Jones v. State, 571 So.2d 1374 (Fla. 1st DCA 1990); R. Regulating Fla. Bar. 4-3.4(e).

One particular reason why it is improper for a prosecutor to himself testify as to his opinions is that, while he adds his "evidence" to the jury's collective knowledge, he is not himself controlled by the rules of admissibility of evidence, nor is he ever subject to the crucible of cross-examination.

In this case, the prosecutor violated this rule on a number of occasions. Some of these violations amounted to flatly false assertions. For example, at one point, the prosecutor claimed that "[t]he defendant admitted yesterday, through the

pictures I gave, that the wall was pushed downward. If they didn't get a top– if there was not a compression from the top –."[2] (VIII. T. 1382/19-23).

Defense counsel immediately objected, noting the outright falsity of the comment. (VIII. T. 1382/24-25).

Despite the trial court's response that the jury was to "recall the evidence," the prosecutor persisted in pushing this false statement of fact, in other words, merely his opinion, upon the jury. (VIII. T. 1383/5-9). His continued comments simply completed his expression of wholly unsupported opinion to the jury. Unfortunately, despite timely objection, the trial court did not take forceful action to curb this misconduct. (VIII. T. 1382/24 - 1383/4).

On yet another occasion, the prosecutor again mischaracterized Mr. Cardenas' testimony. When discussing an incident which took place in Mr. Cardenas' workplace, where Mr. Cardenas had taken some photos showing the accident, the prosecutor claimed that the "defendant, when he testified, admitted that he brought that to work. ***He admitted that Al Bates saw that photograph. The only thing he denies is making that statement***"[3] (emphasis added).

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[2] This point also constituted another unsupported attack upon the credibility of the defense case, since the prosecutor was trying to make the defense theory appear impossible, while no evidence supported the actual assertion.

[3] The statement being an equivocal suggestion that he might have been the operator at the time of the accident. Mr. Cardenas denied the statement, and Mr. Bates was apparently quite confused about these facts, as his testimony on cross-examination revealed. (cf. direct exam at V. T. 902/18 - 903/15 with cross at V. T. 910/1 - 911/14).

The transcript of Mr. Cardenas' testimony reveals that this argument is untrue. Mr. Cardenas ***did not*** admit that Al Bates saw the photo. (VII. T. 1267/18 - 1268/5). He not only denied making the statement Mr. Bates claimed he made, but he also denied that Mr. Bates ever saw the subject photos. Therefore, quite clearly, both of the emphasized statements of the prosecutor ***are false***. They are, then, at best, nothing more than the prosecutor's unfounded personal opinion. At worst, it cannot be ruled out that they represent a deliberate attempt to mislead the jury with false information.

On still another occasion, the prosecutor indulged in argument without any basis in fact. When discussing the height of the windshield relative to a standing driver, he stated

> and you noticed yesterday Mr. Cardenas, when I asked him, how far did that windshield come up on you when you stand behind it? Oh, it comes up to my neck. That's impossible sir. It can't come up to your neck because you're not that tall – or that small. ***And he finally agreed it came up to his chest*** (emphasis added). (VIII. T. 1393/20 - 1394/1).

Mr. Cardenas, however, never admitted this, as the trial transcript plainly reveals. (VII. T. 1231/13 - 1232/11). The stark contrast between the prosecutor's argument and the truth, reflected in the transcript, show yet another example of this prosecutor's willingness to ignore fact, common sense, legal ethics, and the law

through his obvious eagerness to say almost anything, regardless of its factual support, in order to secure victory.

On another occasion, as described in the following sub-section (describing various denigrations of the defense), the prosecutor rendered his own expert opinion in disagreement with Dr. Nicodemus, the defendant's expert, saying "I beg to differ, and I'm not a mechanical – biomechanical engineer. The type of vehicle is very important. Because in a car, you're more restricted. In this one, you have an open cockpit, and you have a seat pushed up against someone's legs as they're driving the boat." (VIII. T. 1377/19 - 1378/2).

Obviously, and as the prosecutor admitted, he was not qualified to render such an opinion. Even if he had proper credentials, as a prosecutor, he is ethically prohibited from doing what he did, that is, testify to an opinion which, not surprisingly, happened to favor his case. And while perhaps it does not matter on review, his opinion is factually absurd at any rate. In his attempt to distinguish cars from boats, the prosecutor suggests that automobile drivers do not have seat cushions pressing against the back of their legs. The factual absurdity of the argument highlights why counsel are prohibited from expressing their own opinions in summation.

Just a few moments later, the prosecutor again injected himself into the proceedings as an expert. He said: "Now, I agree with Dr. Chilcott [the prosecu-

tion's expert]. When he got this injury to here in his ribs, when he broke his sternum and his ribs and the back of his neck. . .when you hit the barge, you're not going to stop. . ." (VIII. T. 1379/9-14). And the prosecutor does not stop either, but continues opining as to why the only person who could have been the operator was Mr. Cardenas. The prosecutor ends his expert "testimony" with a claim, unsupported by any evidence, that "[t]he only reason he [Mr. Cardenas] didn't die in this accident was because he was, in fact, behind the wheel." (VIII. T. 1380/11-13).

Later, while attacking the defendant's theory of the trajectory Mr. Parrish would have taken if he were driving, the prosecutor yet again made himself an expert witness. With no biomedical or medical testimony to support him, he claimed

> [y]ou would expect to find somebody coming out of there to have injuries to the back of their legs because of that chair. When we go out of something, we don't go up and do a right angle and straightforward. When you go forward, you go like this and your legs come out from under you, and the first thing they do is raise. No broken bones, no hyperextensions. His legs wasn't (*sic*) bent this way, nothing. (VIII. T. 1387/23 - 1388/6).

He further claimed that "[i]f he hit this [the seat], he'd have a bruise. He didn't have it. Mr. Pittman did." (VIII. T. 1388/11-12). And finally, in the same line of argument, apparently aware of the lack of evidentiary support for his argument, the

prosecutor appealed to "common sense," claiming that "common sense tells you he's obligated, if he's standing there, to have injuries to the back of his legs as well as to the front of his body. He didn't have it (*sic*) because he wasn't driving." (VIII. T. 1388/23 - 1389/2).

Perhaps the most serious expression of personal opinion by the prosecutor took place during the state's rebuttal argument. During defense argument, Mr. Cardenas' counsel had heavily stressed the DNA evidence. Despite the undisputed testimony of the physician who treated Mr. Cardenas that his serious facial lacerations would have been bleeding immediately upon their infliction, and despite Dr. Chilcott's testimony that Mr. Cardenas was flung up to the windshield, knocked it off the boat, and then fell back into the cuddy cabin, the FDLE crime scene analysts could find ***none of Mr. Cardenas' blood anywhere where Dr. Chilcott indicated Mr. Cardenas' trajectory had supposedly taken him***. (VIII. T. 1432/5 - 1434/11).

Apparently realizing the damage that this argument might do, the prosecutor simply added new facts, totally unsupported by any record evidence, to defeat the defendant's argument. He speculated that while being towed in, the boat "was on the water line anyway, being towed in. It's going to get wet. They found every bit of blood they could." (VIII. T. 1451/1-3).

The prosecutor added this "new fact," and thereby suggested, without any evidentiary support, that water had washed spilt blood away. Perhaps this is true, and perhaps it is not. No one knows, however, because the state presented no evidence at all that there was any "wetness," water, nor any other agent present which might have somehow removed blood that should have been present around and between the helm and the area of the windshield, which is of course relatively high on the structure of the boat.

This may seem to be a small point. It is not. The defense heavily stressed the lack of evidence of Mr. Cardenas' blood in the area it should have been in if Dr. Chilcott was correct. The prosecutor, lacking any evidence with which to respond, simply invented the "fact" that water must have washed Mr. Cardenas' blood away.

Defense counsel objected to this argument. (VIII. T. 1451/17-20). The trial court, however, merely noted the objection, and asked the prosecutor not to try to shift the burden of proof. (VIII. T. 1451/21-24). This "curative instruction," obviously did little to change things, as the prosecutor resorted to the same strategy again only moments later, when suggesting that a lack of evidence as to lower body injuries on Mr. Cardenas (which favored his theory) was Mr. Cardenas' problem. (VIII. T. 1452/15 - 1453/11). This passage also ends with the prosecutor again opining "[d]espite what they want to tell you, it's not going to happen the way they said it did." (VIII. T. 1453/9-11).

Fundamental due process calls for a fair trial upon the actual facts introduced into evidence, not those invented by an overzealous prosecutor during summation. After a week-long, complex trial, the prosecutor told the jury a new story, one which had little to do with the facts. Mr. Cardenas is entitled to a trial upon the actual facts.

b. The prosecutor improperly denigrated both the defendant, his defenses, and defense counsel.

Some of the most troubling comments of the prosecutor were those which unfairly denigrated the defendant, his defenses, and his counsel. Under Florida law, it has been long established that is it totally improper and impermissible for a prosecutor to engage in such denigration instead of arguing the merits of the state's case. This case should have been tried upon its merits, not upon the feelings of the prosecutor for the defense. Briggs v. State, 455 So.2d 519 (Fla. 1st DCA 1984) (such argument improper, conviction to be set aside in close case); Cochran v. State, 280 So.2d 42 (Fla. 1st DCA 1973) (conviction affirmed only because of overwhelming evidence of guilt); McGhee v. State, 435 So.2d 854 (Fla. 1st DCA 1983) (again, conviction affirmed only because of lack of substantial factual dispute, in stark contrast to the instant case); Brooks v. State, 762 So.2d 879 (Fla.

2000); Miller v. State, 782 So.2d 426 (Fla. 2d DCA 2001) (case bears an overall eerie similarity to the instant case).

In this case, the prosecutor applied a "straw man" attack, unsupported by any evidence, to cut away improperly at the credibility of the defendant, his defenses, and implicitly his counsel. On the issue of the timing of the consumption of alcohol, he said

> [y]ou ask yourself (*sic*) whether or not that story about them stopping at 3 o'clock in the afternoon makes sense. Because it was a .09 – between a .09 and .12 two hours after the accident. It was a .09 at 9 o'clock at night, which was four hours after the accident. So he was on the downward slope at that time. His blood alcohol was a lot higher at the time of the accident – .[4] (VIII. T. 1368/3-10).

The simple problem with this argument is that neither the defendant, nor his counsel, nor anyone else for that matter, ever claimed that Mr. Cardenas and the other adults on his boat had stopped drinking at 3 o'clock. There was, moreover, no evidence at all of a retrograde extrapolation of alcohol level. This was, therefore, an argument wholly unsupported by any record evidence at all. Through it, the prosecutor improperly cut away at the credibility of Mr. Cardenas' defenses, making it appear that there was some reason to disbelieve him, when in fact, no such reason existed. In addition, since obviously only Mr. Cardenas' counsel had argued for him, this was an implicit, yet clear, attack upon counsel. Although

[4] Interrupted by defense objection.

defense counsel's objection was sustained, no effective curative action was taken. (VIII. T. 1368/11-16).

On another occasion during summation, the prosecutor made this unfounded accusation, aimed at defense counsel: "The defendant has gone to extremes to show that Buddy Gomez somehow has a – some kind of, I don't know, bias in this case." (VIII. T. 1373/1-3).

The record reflects something quite different. In fact, witness Gomez had, ***while the investigation of this case was still open, and while he was still involved in the investigation, contacted the widow of victim Parrish, and purchased from her a boat*** (VI. T. 1135/6 - 1136/9, VI. T. 1139/20 - 1145/14). ***Moreover, he bought the boat at an advantageous price (about 60% of market value), and the alleged victim's widow financed the purchase for three years interest free!*** Id. This obvious evidence of potential bias was presented to the jury, and the record reflects nothing unusual in its presentation, except considerable evasiveness from witness Gomez when questioned about the transaction. Id.

Despite the obvious reasons for presenting this testimony, the prosecutor saw fit to unfairly characterize its presentation as "going to extremes." Plainly, there was nothing wrong with presenting this evidence, and again, to fail to have done so would have amounted to the grossest omission on the part of defense

counsel. Nevertheless, the prosecutor exploited defense counsel's fulfillment of his duty to Mr. Cardenas as a means to attack Mr. Cardenas and his counsel.

On still occasion, the prosecutor combined an unjustified attack upon Mr. Cardenas' expert witness, with a bold expression of his own opinion. He argued

> Dr. Nicodemus [defendant's expert] gave a pretty interesting statement when he testified. He said, the type of vehicle is not as important as the type of injury. I beg to differ, and I'm not a mechanical – ***biomechanical engineer***. The type of vehicle is very important. Because in a car, you're more restricted. In this one [the Cardenas boat], you have an open cockpit and you have a seat pushed up against someone's legs as they're driving the boat" (emphasis added) (VIII. T. 1377/19 - 1378/2).

In this instance, not only is the prosecutor's opinion unsupported by any evidence (nothing in the record indicates that Dr. Nicodemus' statement was incorrect), but most curiously, the prosecutor himself admits his own lack of qualification to render such an opinion. The point, however, is not that the prosecutor is not a biomechanical engineer, which is true; but rather that the prosecutor should not be offering his opinion to the jury regardless of his qualifications. Additionally, the prosecutor ridiculed the distinction between biomechanical and mechanical engineers which the defense was asserting was important in the comparative evaluation of the expert witnesses.

But this was not the only occasion on which the prosecutor saw fit to improperly denigrate Dr. Nicodemus' opinions. Later, he claimed of Dr. Nicode-

mus' testimony, "[t]hat doesn't make sense,"[5] (VIII. T. 1395/15) and "[t]hat made no sense, none. And I left it there. I didn't ask him about it because it didn't make sense." (VIII. T. 1395/21-23).

This "put down" of Dr. Nicodemus is also troublesome because it falsely implied that the credibility of Dr. Nicodemus' testimony relied entirely upon which side of Mr. Cardenas' body a rib fracture had happened. Instead, Dr. Nicodemus had made clear that there were numerous objects on the boat which could have inflicted this, and Mr. Cardenas' injuries , spread throughout the boat. (VI. T. 1020/19 - 1022/16).

Having repeatedly, improperly assaulted the credibility of the defendant's expert, the prosecutor also decided to ridicule the defendant's theory of where the persons aboard the boat had been thrown during the accident. He stated:

> [t]here's too much – too many obstacles right here along with the closed hatch for him to just do – do a ***Buffalo Bill shot and go right into the bow of the barge***. It didn't happen. It did not happen. The only reason Cardenas [defendant] didn't suffer more is because he was driving the vehicle (*sic)* at the time – or vessel" (emphasis added). (VIII. T. 1396/14-20).

This statement also contains the wholly unsupported medical opinion of the prosecutor concerning the cause of injury to Mr. Cardenas.

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[5] Referring to the side of Mr. Cardenas' body on which his broken ribs had occurred.

Finally, while commenting on the equivocal testimony of Mr. David Pittman, who was a passenger on the ill-fated vessel, the prosecutor again sarcastically denigrated the defense, before the defense had a chance to argue at all, by saying "[n]ow why would you make that statement if it isn't true? ***They're going to tell you he was out of his wits. That's what they're going to argue***. That's what Mr. Pittman said. But no, you don't make a statement like that unless it's true" (emphasis added). (VIII. T. 1371/17-22).

Not only did this comment unfairly cast the defendant's case in a disreputable light, vouched for the credibility of the witness, and also created a Hobson's choice for defense counsel. On one hand, if defense counsel left this issue alone, then he would have failed to properly address one of the key ambiguities in this case. On the other hand, if counsel chose to address the factors which might have led Mr. Pittman to make confusing statements shortly after this highly traumatic event, then jurors would likely be thinking to themselves, "aha, now he's going to try to tell us Mr. Pittman was "out of his wits." This situation is very much akin to ridiculing the insanity defense when it is an issue.

c. The prosecutor openly violated a clear stipulated order in limine directing him not to suggest that Mr. Cardenas' ownership of his

boat suggested he was the operator at the time of the accident, and did so while plainly misrepresenting the testimony of a key witness.

Both under Florida law, and through common sense, it is obvious that counsel is obligated to follow a court's orders in limine. Quinones v. State, 766 So.2d 1165 (Fla. 3d DCA 2000); Martinez v. State, 761 So.2d 1074 (Fla. 2000); Houghton v. Bond, 680 So.2d 514 (Fla. 1st DCA 1996). In addition, violation of such an order may be grounds for setting aside a judgment. Fischman v. Suen, 672 So.2d 644 (Fla. 4th DCA 1996).

In this case, the trial court had accepted the prosecutor's stipulation that the state was not to argue to the jury that because Mr. Cardenas owned the ill-fated boat, he must have been the operator at the time of the accident. In fact, this point is so abundantly clear that the prosecutor himself stipulated to it, during the hearing on Mr. Cardenas' Amended Motion in Limine. (II. R. 335/14-24).

Despite this, during closing argument, the prosecutor both mischaracterized clear testimony and violated this stipulation. He claimed, when commenting upon the testimony of witness David Pittman, "[a]nd I asked him – I said, Why did you say that? He said, Well, ***I assumed he was going to be the driver of the boat; he owns it***. And he also said, The reason I wanted him to slow the boat down was

because - -"[6] (VIII. T. 1369/8-12) emphasis added. But Mr. Pittman never actually said this.

The true exchange between the prosecutor and Mr. Pittman went as follows:

Q- (by the prosecutor): Before he left the back of the boat, what did you tell him?

A- That after we finish cleaning the boat out, we needed to slow the boat down to look for debris in the water, because it was right after the hurricanes.

Q- Did you tell him to slow the boat down?

A- Yes, sir.

Q- Why did you tell him that if he wasn't operating the boat?

A- Well, it is his boat.

Q- So he goes up front and you don't see him for 10 or 15 minutes before the accident?

A- Yes, sir. [testimony moves to other issues] (III. T. 409/11-21).

This testimony stands in stark contrast to what the prosecutor claimed in summation. The actual testimony rather obviously describes why Mr. Pittman would suggest to Mr. Cardenas the slowing of the boat, even when Mr. Cardenas

[6] Interrupted by objection.

was not driving. In particular, it is entirely reasonable to make comments such as Mr. Pittman did to a non-operating boat owner, assuming that he would be the one person best situated to direct the non-owner operator to drive safely. Instead, during summation, the prosecutor unfairly and inaccurately twisted this testimony in favor of the state, incorrectly suggesting that Mr. Pittman said he had assumed that Mr. Cardenas was going to be the driver soon.

Defense counsel objected to the prosecutor's comment. (VIII. T. 1369/13-15). Unfortunately, the trial court would not explicitly rule on the objection, and instead simply told the jury to use their "collective recollection" in making their decision. (VIII. T. 1369/16-23). Under these circumstances, Mr. Cardenas, through counsel, respectfully submits that this response was completely inadequate to remedy the harm created by the prosecutor's inaccurate comment, and that this error was preserved for review.

The repeated inaccurate and misleading arguments by the prosecutor had the effect of injecting multiple conflicting assertions of fact, some correct, some not, into the minds of the jurors. The jury was faced with untangling a huge mass of facts developed after a week-long trial. So, after being fed numerous incorrect factual assertions, including that the defendant had lied about when he stopped drinking, the jury was then given an instruction that they were free to make a presumptive finding on a key element of the charged offenses.

CONCLUSION

The petitioner adequately preserved his claim that the erroneously given presumption instruction was reversible error. Under existing law, he could have done no better, and thus the District Court's holding that he should have been more specific is unavailing. Further, this was fundamental error since the instruction, which was unjustified since the state could not and did not comply with the implied consent regime, invited the jury to make an unwarranted presumptive finding on a key element of a charged felony offense: BUI Manslaughter. Moreover, this happened in the context of a hotly contested, extremely close case, the type most likely to generate fundamental error.

During summation, the prosecutor repeatedly violated the petitioner's due process right to a fair trial by making many varieties of improper comment. While not all were preserved, some were, and certainly together, these comments rise to the level of reversible, fundamental error, since they both operated to distort the basic truth seeking function of trial. This was done by portraying the facts favoring the state in way not supported by the evidence, and also, by denigrating the defense in such a was as to unjustly cut away at the defense's credibility. These repeated misstatements of fact so destabilized the factual context of this case that the giving of the erroneous jury instruction was pushed far beyond any realm where it might

be deemed harmless error. Although the District Court declined to address these issues in its opinion, this Court can and should address these serious errors.

CERTIFICATE OF SERVICE

I CERTIFY that a copy of the foregoing has been furnished to Robert L. Martin, Assistant Attorney General, Attorney General's Office, PL-01, The Capitol, Tallahassee, Florida 32399-1050, and to Ronald R. Cardenas Jr., c/o The Florida Department of Corrections, by regular U.S. Mail this _____ day of August, 2002.

CERTIFICATE OF COMPLIANCE WITH FLA.R.APP.P. 9.210

I further certify that I have read and complied with the most current version of Fla. R. App. P. 9.210. This brief is printed in the 14-point Times Roman font generated by this office's computers and printers.

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