IN THE SUPREME COURT OF FLORIDA

LUCIOUS BOYD,	)	
	)	
Appellant,	)	
	)	
vs.	)	CASE NO. SC02-1590
	)	
STATE OF FLORIDA,	)	
	)	
Appellee.	)	
	)	
_____	)	

REPLY BRIEF OF APPELLANT

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TABLE OF CONTENTS

AUTHORITIES CITED

CASES
PAGE

FLORIDA STATUTES

FLORIDA RULES OF CRIMINAL PROCEDURES

ARGUMENT

1. WHETHER THE COURT ERRED IN REFUSING TO INQUIRE OF THE JURORS AND DENYING A MISTRIAL UPON HEARING TESTIMONY THAT JURORS HAD DISCUSSED EXTRA-JUDICIAL INFORMATION THAT APPELLANT HAD COMMITTED SIMILAR CRIMES IN THE PAST.

Appellee says a decision about juror interviews is reviewed for an abuse of discretion under Shere v. State, 579 So.2d 86 (Fla. 1991) and Gonzalez v. State, 511 So.2d 700 (Fla. 3rd DCA 1987). In Shere, the judge refused an interview request based on an anonymous letter to a newspaper. This Court wrote at pages 94-95:

> The letter to the editor was wholly unsupported by any sworn affidavits or other evidence; it was anonymously sent to a newspaper; it failed to name any of the jurors it accused; and there was no way the trial court reasonably could have identified the accused jurors to single them out for interviews. We conclude that the trial court did not abuse its discretion in refusing to grant the motion to interview the jury. Likewise, we find that the trial court was within its discretion to rule that the letter did not rise to the level required by rule 3.600(a)(3) to warrant a new trial.

Shere does not alter the rule of Marshall v. State, 854 So.2d 1235, 1241-42 (Fla.2003) that "any receipt by jurors of prejudicial nonrecord information constitutes an overt act subject to judicial inquiry." Gonzalez found an abuse of discretion in not inquiring of a juror. Roland v. State, 584 So.2d 68, 70 (Fla. 1st DCA 1991), explained (e.s.): "When the motion alleges juror misconduct, and the trial court determines that a prima facie

showing of juror misconduct has been made, the motion to interview the juror or jurors should be granted."

A judge does not have discretion to make a ruling contrary to law: "This is not an abuse of discretion. The appellate court in reviewing such a situation is correcting an erroneous application of a known rule of law." Canakaris v. Canakaris, 382 So.2d 1197, 1202 (Fla.1980). Decisions must comply with prior case law: "Judges dealing with cases essentially alike should reach the same result. Different results reached from substantially the same facts comport with neither logic or reasonableness." Id. 1203. At bar, there was a prima facie showing of juror misconduct, and established law required juror interviews.

Page 10 of the answer brief (hereafter "AB") seems to rely on this passage between the judge and two deputies (T 2293-94) (e.s.):

> THE COURT: If you wish to have me call this witness forward, I will make an inquiry. There's really now [sic] reason based on now what we are at least collectively hypothecating, there's no need for my deputies to ask because the general procedure in this courtroom in this courtroom is when jurors, again once the jury has been sat are sworn, we don't let them languish in the hallways, we get them and seat them in the jury room to keep them sequestered from the public.
>
> And just as a general proposition, Robin and Tracey, was that done in this case? And, again, I'm not asking any specifics.

THE DEPUTIES: Yes.

This colloquy does not refute Ms. Alcide's testimony. There were at least two other bailiffs during the trial, T 20 (introducing bailiffs Robin, Beverly and John during voir dire), and even Robin and Tracey did not say (much less swear) that the procedure was used every day of the trial or that jurors had no access to public bathrooms. In fact, the procedure was for jurors to gather outside the courtroom in the afternoon after lunch. T 883. Hence, they could use the public restrooms near the courtroom.

The fact that Ms. Alcide was not a perfect witness does not alter the fact that the defense put forward sworn testimony making a prima facie case of jury misconduct requiring an inquiry.

So far as AB 14-15 says the conduct inhered in the verdict, the suggestion is baseless. Appellant agrees with AB 16 that a court is to resolve conflicting testimony, but that rule assumes a full hearing. Cf. Kelly v. State, 569 So.2d 754 (Fla. 1990) (post conviction; court questioned counsel who reported misconduct, and all twelve jurors). At bar, there was no jury interview. The defense met the requisites of Baptist Hospital v. Maler, 579 So.2d 97 (Fla. 1991); its claim was not frivolous under U.S. v. Ramsey, 726 So.2d 601 (10th Cir. 1984). Cf.

Marshall, 854 So.2d at 1241-42 ("Indeed, this Court has stated that any receipt by jurors of prejudicial nonrecord information constitutes an overt act subject to judicial inquiry. [Cit. to Baptist Hospital.]"). AB 16-17 says the remand in Marshall, a post-conviction case, was for a limited inquiry, but overlooks that it included jury interviews: "The scope of the hearing on remand is limited to attempting to obtain the identity of the female juror who spoke to Mr. Smith, to interview that juror, and then to conduct further interviews only if the court determines that there is a reasonable probability of juror misconduct." 854 So.2d at 1253. Appellee distinguishes Gonzalez and Henderson v. Dade County School Bd., 734 So.2d 549 (Fla. 3rd DCA 1999) because the persons reporting the misconduct were a juror (Gonzalez) and an attorney's assistant (Henderson). But neither person seems to have made the allegations under oath, whereas at bar the defense presented sworn testimony.

2. WHETHER THE COURT ERRED IN OVERRULING THE DEFENSE REQUEST FOR BRADY MATERIAL AND DENYING THE DEFENSE MOTION TO STRIKE THE TESTIMONY OF THE FINGERPRINT EXAMINER.

Appellee's brief does not seem to dispute that there was a discovery violation. It agreed below that it would have given the list on request, T 1542-43,[1] and the judge based his ruling

[1] This agreement short-circuited any need for appellant to argue it was discoverable as the result of a comparison.

on a view that the document could not be reconstructed. T 1547-48.

The standard of review at AB 21 pertains to post-conviction Brady claims.[2] Rogers v. State, 782 So.2d 373, 377 (Fla.2001), quoting a prior decision, noted (e.s.):

> The ultimate test in backward-looking postconviction analysis is whether information which the State possessed and did not reveal to the defendant and which information was thereby unavailable to the defendant for trial, is of such a nature and weight that confidence in the outcome of the trial is undermined to the extent that there is a reasonable probability that had the information been disclosed to the defendant, the result of the proceeding would have been different.

The case at bar involves a mid-trial discovery issue. The standard as to failure to disclose in this context is that set out in Richardson v. State, 246 So.2d 771 (Fla.1971). Perdomo v. State, 565 So.2d 1375, 1376 (Fla. 2nd DCA 1991) states (e.s.):

> Any motion for a Richardson hearing triggers an inquiry "designed to ferret out procedural prejudice occasioned by a party's discovery violation." Smith v. State, 372 So.2d 86 (Fla.1979). This procedural safeguard is especially important when a Brady [FN omitted] violation is claimed because the prosecution has a continuing duty to disclose to the defendant any evidence favorable to the defendant; failure to do so results in a due process violation of constitutional

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F.R.Crim.P. 3.220(b)(1)(J).

[2] One case cited by the state, Stephens v. State, 748 So.2d 1028 (Fla.1999), actually concerns the standard for post-conviction litigation of an ineffective assistance of counsel claim.

> proportions when the suppressed evidence is material to the defendant's guilt or punishment. State v. Hall, 509 So.2d 1093 (Fla.1987), citing United States v. Bagley, 473 U.S. 667, 682, 105 S.Ct. 3375, 3383, 87 L.Ed.2d 481 (1985); see generally, W.R. LaFave & J.H. Israel, Criminal Procedure § 19.5 (West 1985). The Florida Supreme Court decided Richardson to effectuate the Brady rule as codified in Florida Rule of Criminal Procedure 3.220. Hall, 509 So.2d at 1096.

This Court noted at page 1096 of State v. Hall that Brady inspired the rules of discovery, and held that Richardson applies to a claim of failure to disclose exculpatory evidence under Brady.

At bar, there was no dispute about the fact that the evidence was discoverable and that Richardson applied. The prosecutor's argument was that the defense might have learned about it at a deposition of the witness and that he personally should not be blamed for the officer's act.[3] There was no need to show it was actually exculpatory or impeaching in the way required on post-conviction. It is too late for the state to say appellant had to make such a showing. Cf. Robertson v. State, 829 So.2d 901 (Fla. 2002). The state put on evidence that Robertson had threatened a person, contending he had opened

[3] The state had contended that defense counsel likely knew about the document before trial, but apparently abandoned that contention when he denied prior knowledge. It now repeats this charge at AB 26. It will suffice to say that the state presented no evidence on this point, and the judge made no such finding.

the door to the evidence. The Third DCA found it admissible as collateral crime evidence, a ground the state had not asserted. Id. 905-906. This Court reversed, writing that use of collateral crime evidence involves weighing "multiple considerations", and, as the state did not advance the collateral crime theory at trial, the defense could not litigate that issue at trial. Id. 907-908. Hence, "Robertson never received an opportunity to present evidence or make argument as to why the incident involving his ex-wife should not have been admitted under the Williams rule." Id. 908. See also Valley v. State, 860 So.2d 464, 467 (Fla. 4th DCA 2003) (appellee could not argue for first time on appeal that hearsay was not admitted to prove truth of matter asserted).

Further hobbling the defense was the fact that a state agent destroyed the evidence. In effect appellee's argument is that if its own agent destroys potentially exculpatory evidence, the opposing party has to prove its exculpatory value. Florida law makes an adverse inference from destruction of evidence. Cf. Amlan, Inc. v. Detroit Diesel Corp., 651 So.2d 701, 703 (Fla. 4th DCA 1995) ("the destruction or unexplained absence of crucial evidence may result in a permissible shifting of the burden of

proof").[4] The prosecutor understandably did not dispute the issue since his own client destroyed the evidence. As the state did not dispute below that the report it destroyed was discoverable, it cannot now say it was not exculpatory or impeaching.

The fact that counsel did not depose the witness does not end the issue. Appellee has not disputed the cases in the initial brief, and the prosecutor said it "never came up in my discussions with Tom [the witness]." T 1542. If it did not come up between Tom and the prosecutor, who had much greater access to the witness, where is the likelihood that it would have come up in a deposition?

In Squires v. Dugger, 794 F.Supp. 1568 (M.D. Fla. 1992), a federal habeas corpus case (of course, federal habeas corpus review is extremely deferential), Squires sought to show that his prints were not at the scene. It did show this fact on cross of the witness, "the exact point the Petitioner needed to make", so there was no prejudice in non-disclosure of the reports. At bar, appellee contended the prints matched appel-

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[4] The rule at AB 28, n. 6, concerns dismissal of charges for bad faith destruction of evidence under Arizona v. Youngblood, 488 U.S. 51 (1988), and post-conviction Brady cases as cited by appellee. Merck v. State, 664 So.2d (Fla.1995) merely involved failure to collect all potential evidence where one had to "stack multiple inferences" to consider it useful to the defense. The rule does not apply to Richardson issues.

lant, a claim the defense could not refute.

AB 27-28 may inadvertently make this Court think two entirely separate sets of prints were enhanced. In fact, there were two enhancements of the same prints, which were two usable prints on the trash bag. T 1524 ("only those two" were enhanced), 1525. These prints, exhibits 7A and 2B, T 1528, were taken from the trash bags by Det. Suchomel and came in as exhibit 145. T 936-39. Suchomel gave them to the examiner, and they were enhanced "with our older system" apparently in 1999. T 1520-21. The examiner ran the enhancement through the AFIS system, T 1521-22, but destroyed the results, giving rise to this point on appeal. In June 2001, there was another enhancement of 7A and 2B, and the identification was made from this enhancement. T 1523, 1528.

AB 28-29 misapprehends Richardson. There is no such thing as a "Richardson objection" necessary to preserve a discovery issue for appeal. Richardson lays out the procedure for ruling on a discovery objection. At an arson trial, a co-defendant who turned state's evidence said "Dick Davis" had been the contact man in the arson scheme. 246 So.2d at 776. There was "reason to believe" the state knew of the claim that "there was one 'Dick Davis' who was supposed to be the 'contact man' between the owner, Grooms, and such co-defendant and the petitioner,

Richardson". Id. The judge denied a mistrial. This Court ruled that, although Dick Davis never testified, the state had a duty to disclose his name as one with knowledge of the offense, observing (id.; e.s.):

> And we should not speculate as to whether there was in fact such a witness as "Dick Davis", nor whether, if so, he had information "relevant to the offense charged" or "to any defense of" the petitioner who was "charged with respect thereto." At least, petitioner's counsel should have had an opportunity before trial to investigate him and determine if any information he had would be of value to petitioner in his defense of the charge against him.

This Court found error in denying the mistrial without an inquiry, and ruled that a judge must find whether the discovery violation was willful, substantial and prejudicial.

Thus, the rule is that a court faced with a discovery objection must make an inquiry and the required findings before overruling the defense objection or request for relief. The defense invokes the Richardson procedure by making the discovery objection or requesting relief. The state then must show that there was no discovery violation or that the violation was not willful or prejudicial or that relief is inappropriate.

At bar, there was no dispute about the fact that the document was subject to discovery and that the state had not provided it in discovery. The defense objected and sought specific relief, so the matter is preserved for appeal.

3. WHETHER THE STATE'S EVIDENCE WAS SUFFICIENT TO SUPPORT THE CONVICTIONS.

Appellant disagrees with argument at AB 33 that he challenged only the "armed" element of sexual battery. He said the state did not show use of a deadly weapon or use of armed force to accomplish non-consensual intercourse, or that intercourse could have occurred after the murder, adding: "You have to show that force was used to accomplish the intercourse and there isn't any evidence about that. None. So, I would again move for a directed verdict." T 1772. The state understood, replying that it had shown "something that happened without the consent of the victim." T 1772-73.

Appellant disagrees with argument that the circumstantial evidence rule does not apply. Pagan v. State, 830 So.2d 792, 803-04 (Fla.2002), unlike at bar, involved "direct evidence of Pagan's confessions and statements made to Antonio Quezada and Keith Jackson explaining his intent and motive for the crimes", so the rule did not apply. Conde v. State, 860 So.2d 930, 943 (Fla.2003) is similar. Crump v. State, 622 So.2d 963, 971 (Fla.1993), was a circumstantial case; the state refuted the defense claim with evidence that the victim was strangled as part of a series of such crimes committed by Crump.

Every prosecution involves some direct evidence. For example, murder cases usually have direct evidence that the

victim is dead. Such evidence does not bar application of the rule to a disputed element as to which there is only circumstantial evidence. The "direct evidence" cited at AB 34 is much less substantial than in cases such as McArthur v. State, 351 So.2d 972 (Fla.1977) (when police arrived at home, wife said gun had fired accidentally, killing husband; evidence did not refute hypothesis) and Terry v. State, 668 So. 2d 954 (Fla. 1996) (co-defendant and robbery victim's husband testified that defendant emerged from gas station store immediately after shooting victim; premeditation not proven).

AB 35 repeats the claim that appellant did not preserve the issue of sufficiency of the evidence as to sexual battery. As shown above, appellee is incorrect.

Washington v. State, 653 So.2d 362 (Fla.1994) does not help appellee. The 92 year old victim had been vaginally and anally raped, and the opinion does not show that the defense sought acquittal on the ground of consensual sexual activity. The 82 year old disabled victim in Morrison v. State, 818 So.2d 432 (Fla.2002), needed help to bathe and dress; his stab wounds were inconsistent with defense claims that they were self-inflicted in a struggle. In Jimenez v. State, 703 So.2d 437 (Fla.1997), Jimenez repeatedly stabbed the vital organs of a 62 year old woman: "The deliberate use of a knife to stab a victim multiple

times in vital organs is evidence that can support a finding of premeditation." Id. 440 (e.s.). In Crawford v. State, 146 Fla. 729, 1 So.2d 713 (Fla. 1941), Crawford got mad at a man interested in a woman who lived with him. He cut the woman with a large knife in an argument. He then went outside, spoke to the man, and stabbed him in the head in a witness's presence. These cases are unlike the case at bar, in which the details of the episode are unknown and the state did not prove premeditation.

AB 40-43 argues there was a kidnapping with intent to commit sexual battery. This claim is speculative for the reasons set out as to sexual battery. If the evidence showed, as appellee contends, forcible abduction from the Texaco station in order to commit sexual battery at the apartment, and a continued abduction to the warehouse area, it would show a kidnapping in order to commit sexual battery. The evidence does not show that, however.

Also speculative is argument that the wounds were inflicted while Dacosta "was conscious and defending herself. (T 764-70)." AB 44. The pathologist merely testified to the injuries at 764-70. He did not say she was conscious and defending herself. It was stipulated only that "The injuries on the hands and arms of Dawnia Dacosta are consistent with defensive wounds." T 765 (e.s.). The state did not conclusively show

that these actually were defensive wounds or that she was conscious at the time.

The initial brief discusses State v. Smith, 840 So.2d 987 (Fla. 2003) and Bedford v. State, 589 So.2d 245, 251 (Fla. 1991). Evans v. State, 838 So.2d 1090 (Fla.2002) does not bear on this issue: after shooting one man, Evans made the others accompany him, so there was a kidnapping. Sutton v. State, 834 So.2d 332 (Fla. 5th DCA 2003) does not explain how to judge if an abduction was committed with an intent to terrorize or cause bodily harm. Apparently the kidnapping consisted of moving Alford to a back room to avoid police detection rather than out of an intent to terrorize or cause bodily harm. The opinion does not reflect that Sutton made the argument made at bar, namely that the state failed to show an abduction made for purposes of inflicting bodily harm or terror.

Sean v. State, 775 So.2d 343 (Fla. 2nd DCA 2000), shows the problem with appellee's argument. It says there is no standard for applying the "intent to inflict terror" element: "We appreciate and share Sean's concern that this portion of the statute and the lack of case law fails to provide a standard for the State to prove 'intent to inflict terror.' It would appear that the question of intent is left to the collective wisdom of the jury." Id. 344. But the law uses the jury's wisdom to

resolve factual disputes, not to decide the legal issue of what constitutes an element of a crime. The state's approach to the kidnapping statute makes it so amorphous as to violate due process because the intent element will vary from jury to jury and from case to case.

> 4. WHETHER THE COURT ERRED IN OVERRULING THE DEFENSE OBJECTION TO EVIDENCE THAT APPELLANT HAD BEEN CHARGED WITH A CRIME OF DISHONESTY, FAILURE TO PAY A TRAIN FARE, AND IN OVERRULING THE DEFENSE OBJECTION TO THE STATE'S USE OF THE CITATION IN CROSS-EXAMINING APPELLANT.

Appellant agrees that the abuse of discretion standard applies to evidentiary rulings, but notes that the Evidence Code and case law narrows a judge's discretion:

> A trial judge's ruling on the admissibility of evidence will not be disturbed absent an abuse of discretion. [Cit.] The trial court's discretion is limited by the rules of evidence. [Cit.]

Johnston v. State, 863 So.2d 271, 278 (Fla.2003). Hence, although some cases use the term "clear abuse of discretion", a judge does not have discretion to make a ruling contrary to law. Trease v. State, 768 So.2d 1050, 1053, n.2 (Fla.2000) is beside the point since it did not involve an evidentiary ruling.

Even assuming, contrary to law,[5] that opening statement paved the way for inadmissible evidence, the citation did not

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[5] Cf. Taylor v. State, 855 So.2d 1, 20, n. 21 (Fla.2003) (opening statements do not open door to otherwise inadmissible evidence); Burns v. State, 609 So.2d 600, 605 (Fla.1992) (same).

refute the opening statement. As quoted at AB 46, counsel said appellant did not live at the apartment on April 1. The December citation did not show he lived there on April 1. He was in jail on April 1. Hence, there is no basis for admission of the citation, and the judge's ruling was clearly erroneous. Similarly, contrary to AB 48, there was no dispute as to "who had access to apartment #2 during the time DaCosta's blood was deposited there." The defense contended that the police planted the blood on April 1. There was no claim that appellant had access to the apartment then, and the December citation could not show who was there on April 1.

Appellee's argument as to prejudice is basically that the evidence was overwhelming. Contrary to this argument, the test "is not a sufficiency-of- the-evidence, a correct result, a not clearly wrong, a substantial evidence, a more probable than not, a clear and convincing, or even an overwhelming evidence test." State v. DiGuilio, 491 So.2d 1129, 1139 (Fla.1986) (e.s.).

Dornau v. State, 306 So.2d 167 (Fla. 2nd DCA 1974) does not help appellee. The parking tickets were not even directly tied to Dornau: they showed "only that appellant's Car, not appellant nor, indeed, the car seen on the murder day, had been in a certain area of Tampa on a relevant subsequent date." Id. 170. There was evidence that his wife could have had the car when it

was ticketed. Id. The tickets did not involve dishonesty. Finally, the court did not use the State v. DiGuilio standard in determining lack of prejudice: it used an improper overwhelming evidence standard.

5. WHETHER THE COURT ERRED IN OVERRULING THE DEFENSE OBJECTIONS TO THE STATE'S CROSS-EXAMINATION OF APPELLANT.

Appellant relies on the standard of review in his initial brief. The judge's rulings were contrary to the well-settled rule regarding the scope of cross-examination.

Appellant agrees that under Coxwell v. State, 361 So.2d 148, 151 (Fla. 1978),[6] cross is allowed "relative to the details of an event or transaction a portion only of which has been testified to on direct examination". Appellant did not, however, testify on direct about his employment in the family funeral business while growing up, where Lewis's mother lived, photographs of the apartment, the Tri-Rail citation, his fingerprints, or the photo lineup or the other matters brought up on cross. Coxwell was based on a capital defendant's right of confrontation, and did not say that there are no limits to cross (id. 152; footnotes omitted):

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[6] AB 50 also cites Geralds v. State, 674 So.2d 96 (Fla.1996), which is discussed below, and Shere, which is irrelevant as it involved a question about calling a witness as a court witness.

> Our conclusion here should not be construed to suggest that the scope of cross-examination is wholly without bounds, nor that a discretionary curtailment of the inquiry before it exceeds those limits can never be harmless error if no prejudice can be demonstrated. We only hold that where a criminal defendant in a capital case, while exercising his sixth amendment right to confront and cross-examine the witnesses against him, inquires of a key prosecution witness regarding matters which are both germane to that witness' testimony on direct examination and plausibly relevant to the defense, an abuse of discretion by the trial judge in curtailing that inquiry may easily constitute reversible error. In the present case, it clearly it did.

Cross-examination "must either relate to credibility or be germane to the matters brought out on direct examination." Steinhorst v. State, 412 So.2d 332, 337 (Fla.1982).

Thus, Lambrix v. State, 494 So.2d 1143, 1147-48 (Fla.1986), upheld the judge's refusal to allow the cross-examination on the ground that it was "outside the scope of direct" when the defense sought to ask a crime scene officer about a notebook in the victim's vehicle and a picture in his wallet. In Christopher v. State, 583 So.2d 642 (Fla.1991), a state witness testified that the defendant said he had fought with one of the victims. It was proper to forbid cross about a conversation several days later in which he gave an exculpatory account of the episode: "While the two conversations referred generally to the same events, the later conversation did nothing to explain the earlier conversation. The jury could not have been misled as

to the content of the earlier conversation by the exclusion of the later conversation." Id. 646.

Geralds involved cross of Geralds at penalty phase, where the usual rules of evidence do not apply. § 921.141(1), F.S. He denied committing the murder, even though he had been found guilty. Under that circumstance, it was permissible to ask him about evidence linking him to the murder. One cannot tell from the opinion how extensive direct was in this regard or how closely related the cross was to direct. Geralds does not authorize the guilt-phase cross at bar that went far beyond the bounds of direct.

Trepal v. State, 621 So.2d 1361 (Fla.1993) is beside the point as it did not involve cross-examination of the defendant. Chandler v. State, 702 So.2d 186 (Fla.1997) also does not help appellee. Chandler admitted a collateral crime in opening statement. Before he took the stand, the court ruled that the state could ask about the collateral crime. Nevertheless, he took the stand and refused to answer questions on cross about it. This Court wrote that in effect he had invited the error (id. 197; footnote omitted):

> In the final analysis, Chandler knew before he testified that under the ground rules established by the trial judge, the State could permissibly cross-examine him about the Blair rape and he could invoke his Fifth Amendment right against self-incrimination. As illustrated, although he invoked the Fifth Amendment

> numerous times, he also gave some testimony about his fear that the Blair rape and the murders would be linked. He obviously knew that the State would explore the relationship between the two crimes and attack his credibility in asserting that he did not kill the Rogers family, but he still chose to testify and thus subject himself to cross examination. That was Chandler's choice alone and we agree with the State that first, the trial court did not err in letting him live with the resulting consequences and second, error, if any, was harmless since there is "no reasonable possibility that the error contributed to the conviction." State v. DiGuilio, 491 So.2d 1129, 1135 (Fla.1986).

Finally, appellee's argument as to prejudice again contends that there was overwhelming evidence of guilt. To repeat, such is not the correct standard under State v. DiGuilio.

> 6. WHETHER THE COURT ERRED IN FAILING TO CONSIDER DR. SHAPIRO'S REPORT AND FAILING TO HEAR TESTIMONY FROM DRS. SHAPIRO AND BLOCK-GARFIELD AS TO APPELLANT'S COMPETENCY.

Appellee's brief has not contended that the court lacked discretion to consider Dr. Shapiro's report or hear testimony from Drs. Shapiro and Block-Garfield. It does not deny that it knew they considered him incompetent. It does not say counsel could or did make any legal objection to consideration of their opinions.

As to what it does contend, appellant agrees that normally he could not raise this issue due to counsel's odd actions of asking for a competency hearing, advising the court that there was evidence his client was incompetent, but refusing to present

the evidence and even denigrating it. Competency, however, is unique: a judge sometimes must conduct a competency evaluation sua sponte since an incompetent cannot waive his rights. Cf. Gibson v. State, 474 So.2d 1183, 1184 (Fla.1985) ("This Court has consistently held that a 'trial court has the responsibility to conduct a hearing for competency to stand trial whenever it reasonably appears necessary, whether requested or not.' [Cit.]"); Pate v. Robinson, 383 U.S. 375 (1966); F.R.Crim.P. 3.210(b). Hence, Steinhorst does not apply. And it does not advance the debate to accuse on who may have been incompetent with committing a "gotcha" maneuver.

It is true that the judge conducted a sort of competency hearing. Although he knew there was testimony available on the issue of appellant's competency, he seems to have considered himself powerless to consider or hear the evidence: he was "somewhat at a loss even to consider" it. ST 192. Thus, he did not make a discretionary decision based on a correct understanding of the applicable law. Cf. Canakaris.

Appellant does not dispute the contention at AB 59-60[7] that a judge may resolve conflicting testimony. Such did not occur

[7] Appellant does note that the cases cited regarding competency "to stand trial" no longer apply because the question now concerns competency "to proceed." Fla.R.Crim.P. 3.210-3.214.

here: there was not a full competency hearing with conflicting testimony. Hence, the claim at AB 62 that the judge could have rejected the evidence had he considered it is beside the point since the judge did not hear the evidence. That appellant was not taking medicine hardly shows he was competent, and a court may not make a competency evaluation based on its non-expert evaluation of the defendant. Cf. Gibson (error to find previously-incompetent defendant competent on basis of past medical reports and judge's observations of defendant).

7. WHETHER THE COURT ERRED IN NOT ORDERING A COMPETENCY HEARING AT SENTENCING.

Argument at AB 62-66 rests largely on the claim that the judge could rely on the prior adjudication of competency. In Durocher v. Singletary, 623 So.2d 482, 484 (Fla. 1993), there was "nothing more than speculation" that Durocher was incompetent. A prior finding is reliable so far it arises from adversarial testing.[8] At bar, the court did not consider the available expert testimony that appellant was incompetent, and there was more than speculation about his competence. In

[8] Cf. Polk County v. Dodson, 454 U.S. 312, 318 (1981) ("The system assumes that adversarial testing will ultimately advance the public interest in truth and fairness"); Herring v. New York, 422 U.S. 853, 862 (1975) ("The very premise of our adversary system of criminal justice is that partisan advocacy on both sides of a case will best promote the ultimate objective that the guilty be convicted and the innocent go free").

Slawson v. State, 796 So.2d 491, 501-503 (Fla.2001), this Court did order a competency evaluation on post-conviction, so it is beside the point.

Dr. Shapiro told counsel that although he could not reach an opinion, he had "grave concerns" about appellant's competency after recently examining him. T 2158. There was bona fide doubt about his competency.

Hunter v. State, 660 So.2d 244 (Fla.1995), does not help appellee. Hunter says a court "must consider all evidence relative to competence and its decision will stand absent a showing of abuse of discretion." Id. 247 (e.s.). Once it has done so, its decision is presumed correct and has continuing effect until a "bona fide doubt is raised" about the defendant's competency. Id. 248. The judge in Hunter "considered a wide variety of lay and expert evidence", including Dr. Rothstein's testimony, in finding Hunter competent. Id. 247. Counsel later said Rothstein made another report finding Hunter incompetent. One cannot tell when Rothstein had made this evaluation. As the judge had already heard and rejected Rothstein's diagnosis, there was no abuse of discretion in not holding a new hearing. At bar, the court never heard from Dr. Shapiro. Hunter does not apply at bar.

Nor does Hall v. State, 742 So.2d 225 (Fla. 1999) help

appellee. On post-conviction, Hall claimed he had been incompetent at resentencing. But his attorney testified that "he would have asked for a competency hearing if he believed that any expert would support an incompetency finding." Id. 228. The court heard from a variety of experts, and its order considered all available evidence in detail. This Court was sure that if counsel had "any qualms" about Hall's competency "they would have brought this issue to the Court's attention in the appropriate manner." Id. 229. There was no need to conduct a competency hearing sua sponte at the 1990 resentencing given the competency finding at the 1978 trial, as the judge had no reason to consider Hall incompetent. The case at bar is different: counsel knew there were experts supporting a finding of incompetency, but initially decided not to present them for questionable reasons; the court did not hear from a variety of experts or consider all available evidence; when counsel finally sought a full competency hearing, the judge refused.

Pate found error in not instituting competency proceedings sua sponte when four non-experts said Robinson was "insane" or "mentally sick" and had a long history of mental illness, although a stipulation was entered into evidence that a court expert found that he "knew the nature of the charges against him and was able to cooperate with counsel". 383 U.S. at 378-79,

text and n. 2; 384, text and n. 5. At bar, the judge knew that two experts had found appellant incompetent. Hence, error occurred under Pate.

8. WHETHER THE WAIVER OF MITIGATION COMPLIED WITH KOON v. DUGGER, 619 So.2d 246 (Fla.1993).

Appellant disagrees that Mora v. State, 814 So.2d 322 (Fla. 2002) applies here. Mora did not want counsel to investigate his family in Spain. The judge felt that, under Koon v. State, 619 So.2d 246 (Fla.1993), either counsel had to contact the family or Mora had to proceed pro se. He then ruled that Mora had to proceed pro se without an inquiry under Faretta v. California, 422 U.S. 806 (1975). But as penalty proceedings began, the judge found Mora incompetent to represent himself, re-appointed counsel and ordered him to contact the family in Spain. Mora protested that counsel should not take direction from the court, and the court again discharged counsel. Mora then refused to participate in the penalty proceedings. This Court concluded that the judge erred in believing that Koon imposed a "prohibition against waiving any possible mitigation without counsel's full investigation of all possible mitigation." Id. 332 (e.s.). The goal of Koon was "to ensure that a defendant understood the importance of presenting mitigating testimony, discussed these issues with counsel, and confirmed in open court that he or she wished to waive presentation of

mitigating evidence". Id. 333 (quoting Chandler v. State, 702 So.2d 186, 199 (Fla.1997)). It wrote that Mora wanted only to waive the mitigation as to elderly family members in Spain, and concluded that he was fully aware of their potential testimony, that he "was not requesting a waiver of other mitigating evidence", which counsel sought to use, and that, "under the circumstances of this case", his wishes regarding the family members should have been respected so that it was error to make him choose between the investigation and proceeding without counsel. Id. 333.

There was a record as to the specific mitigation Mora was waiving, and his decision and reasons for waiving it. He just did not want his "quite elderly and weak" relatives to suffer the shock of learning of his plight and "felt compelled to protect his family". Id. 331. The court erred in thinking that Koon required investigation of all mitigation before any of it could be waived. Essentially, it took over the defense and told Mora that he had to proceed pro se if he did not like it. At bar, Mora does not apply because the record does not show the nature of the waived mitigation. There was mention of "family records or family history," something about Dr. Shapiro, and "witnesses" available from around the country, T 2160-63, 2216-17, 2215, but we do not what the mitigation was. Mora does

not limit Koon to cases of a total waiver of mitigation. Finally, much of the discussion in Mora is dicta unnecessary to the conclusion that it was error to discharge Mora's counsel.

9. WHETHER THE COURT ERRED IN GIVING GREAT WEIGHT TO THE JURY'S PENALTY RECOMMENDATION.

Again, appellant disagrees with appellee's analysis of Mora. Mora did not address the issue raised here. The judge in Ross v. State, 386 So.2d 1191 (Fla.1980) wrote that he thought the jury recommendation "should be followed" because he found "no compelling reason to override the recommendation of the jury." Id. 1197. Thus, this Court wrote that he had thought he was bound by Tedder v. State, 322 So.2d 908 (Fla.1975) to impose a death sentence. The judge at bar also thought he was bound to give great weight to the recommendation, which is the Tedder standard. Cf. Muhammad v. State, 782 So.2d 343, 362 (Fla.2001 ("It is certainly true that we have previously stated that the jury's recommendation should be given 'great weight.' [Cit. to Tedder.] However, this statement was made in the context of a jury's recommendation of a life sentence."). Ross said at 1197-98 that death recommendations receive "great weight",[9] but

[9] As AB 74 notes, this idea comes from LeDuc v. State, 365 So.2d 149 (Fla.1978). LeDuc plead guilty, apparently with an agreement that the state would recommend a life sentence. The judge "essentially relied on the atrocity of the crime as an aggravating circumstance sufficient to warrant imposition of the death penalty", but did not make the findings required by

this is logically incompatible with the result reached in the case. One cannot make an "independent" evaluation while at the same time giving "great weight" to the death recommendation. Under Muhammad, the Tedder "great weight" standard does not apply to a case like the one at bar in which appellant was an unwilling and irrational participant, so that Grossman v. State, 525 So.2d 833 (Fla.1988) does not apply.

10. WHETHER THE WAIVER OF MITIGATION WAS INVALID BECAUSE THE DECISION WHETHER TO CALL WITNESSES AND PRESENT EVIDENCE IS FOR COUNSEL TO MAKE UNDER THE CONSTITUTION AND FLORIDA LAW.

This issue involves a question of law about counsel's role in our criminal law system. Steinhorst does not apply since the right to counsel is fundamental and because this issue could not have been litigated in the lower court because counsel misunder-

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section 921.141. Id. 150-51. LeDuc's only issue on appeal was that the judge should have declared him a mentally disordered sex offender: counsel did not "challenge[ ] the legal sufficiency of LeDuc's convictions and sentences on any basis". Id. 150. This Court affirmed the death sentence, but it was reduced to life in later proceedings. LeDuc is a poor precedent: most of what occurred there would have resulted in a reversal today, and it has no bearing on today's sentencing procedures. The statement about Tedder occurred as this Court groped for an appellate standard when counsel made no argument challenging the sentence. The rule of stare decisis is based on the idea that prior decisions are the product of adversarial testing. See Boyd v. Becker, 627 So.2d 481, 484 (Fla.1993) ("Because our decision to measure the ninety-day period from the mailing date rather than the date of receipt was not determined in a true adversarial proceeding, the rule of stare decisis does not constrain us in these proceedings.").

stood their role and felt bound by appellant's wishes.

Appellant disagrees that Hamblen v. State, 527 So.2d 800 (Fla. 1988) and Mora govern this issue. The discussion of Hamblen in the initial brief refutes appellee's reliance on it. Mora, as noted above, concerned the judge's view that Mora could not waive any mitigation under Koon until all mitigation was investigated and that Mora would have to proceed pro se unless the lawyer investigated the family in Spain at the judge's direction. The judge told counsel what to investigate, thus taking over supervision of the defense, and then made Mora proceed pro se without a Faretta inquiry. The parties in Mora simply did not litigate, and this Court did not decide, the issue raised here.

Footnote 9 of the answer brief is wrong. The authorities at pages 65-68 of the initial brief require that counsel consult with the client and consider the client's wishes before making an independent professional judgment as to how to proceed. In accepting counsel, a defendant accepts representation by someone bound by the rules governing the bar.

Nixon v. Singletary, 758 So.2d 618, 625 (Fla.2000), used the phrase "captain of the ship" in discussing a defendant's decision whether to plead guilty under Jones v. Barnes, 463 U.S. 745 (1983). The same page of Nixon notes that counsel is to

make other tactical decisions, but that the choice of direction (that is, the plea to enter) is the client's. The decision to plea guilty is outside the realm of counsel's strategy decisions. Id. 623-24. Nixon does not say attorneys are otherwise compelled to undertake strategies contrary to their professional judgment.

As to AB 78-79, appellant agrees a defendant may direct the defense so far as set out in rule 4-1.2(a), Rules Regulating the Florida Bar, and the other authorities in the initial brief.

Appellee's reliance on Grim v. State, 841 So.2d 455 (Fla. 2003) shows the confusion that has arisen from Hamblen. Hamblen waived counsel and, acting pro se, decided to waive mitigation. Such was his right. Hamblen did not say counsel must present or forgo whatever evidence the client wishes regardless of counsel's professional judgment. It did not abolish rule 4-1.2(a) and like provisions of law. Grim did not address the issue which appellant presents at bar, namely whether defendants have the constitutional right to make members of the Florida Bar, even court-appointed ones,[10] forsake their professional judgment in the presentation of the case for life at capital sentencing.

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[10] "Once a lawyer has undertaken the representation of an accused, the duties and obligations are the same whether the lawyer is privately retained, appointed, or serving in a legal aid or defender program." Polk County, 454 U.S. at 318 (1981).

Under Mora, counsel are not subject to the judge's command in this regard, and, under Jones and other authorities, they are not subject to the client's command. After consulting with the client, counsel may forgo mitigation for various reasons, including that it would do more damage than good because the defendant would act out. Cf. Koon v. Dugger, 619 So.2d 246, 250-51 (Fla. 1993). The decision must ultimately be counsel's. At bar, counsel did not make an independent decision: they thought there was some ethical bar to presenting evidence against appellant's wishes.

Appellant's position is grounded in law, as set out in the initial brief, and conforms to rules arising from the deliberative processes of this Court, other courts and the Bar. Counsel is an agent of justice and an officer of the court rather than a mouthpiece for the client's whims. Appellee's position has some support in case law, but this case law arose from ad hoc decisions blurring the role of counsel, and would make counsel into a helpless puppet. This Court should reverse.

11. WHETHER THE EVIDENCE SUPPORTS THE HEINOUSNESS AND FELONY MURDER CIRCUMSTANCES, AND WHETHER SECTION 921.141, FLORIDA STATUTES, ALLOWS A DEATH SENTENCE WHEN THERE IS ONLY ONE AGGRAVATING CIRCUMSTANCE.

Appellant agrees that the state must present substantial competent evidence of an aggravating circumstance. If it rests on circumstantial evidence, the evidence "must be inconsistent

with any reasonable hypothesis which might negate the aggravating factor." Harris v. State, 843 So.2d 856, 866 (Fla. 2003) (quoting Hildwin v. State, 727 So.2d 193, 194 (Fla.1998)).[11]

As to HAC, Dr. Perper's testimony was speculative: although he characterized some wounds as "defensive", this meant only that they were "consistent with" Dacosta getting her right arm up to block blows. ST 470-71. He could not tell the order of the wounds. ST 465-66, 467-68. The cases at AB 83-84 had much less speculation about the murder than at bar. In Guzman v. State, 721 So.2d 1155, 1160 (Fla.1998), the victim was conscious and sitting up in bed, and the "cause of death could not be attributed to any one wound, but resulted from a loss of blood attributable to all of the wounds." In Owen v. State, 862 So.2d 687, 698 (Fla.2003), Owen deliberately inflicted extreme pain on a teenage girl for his sexual purposes. In Duest v. State, 855 So.2d 33, 45-47 (Fla. 2003), the victim was "conscious for as long as fifteen or twenty minutes after the attack," going from one room to another before dying. In Brown v. State, 721 So.2d 274 (Fla.1998), the victim moved and cried out during the attack. By contrast, Brown v. State, 644 So.2d 52, 53-54 (Fla.

[11] The circumstantial rule is one of the oldest of Florida law. Cf. Davis v. State, 22 Fla. 633, 636 (1886) (citing to common law rule); Coleman v. State, 7 So. 367, 370, 26 Fla. 61 (1890).

1994), struck HAC where there were three stab wounds, none of which were immediately fatal, but nothing more was known about how the murder occurred.

Even if the evidence definitely showed Dacosta was conscious and briefly tried to fend off a rape and attack, it still would not establish HAC. In State v. Odom, 928 S.W.2d 18 (Tenn.1996), the Tennessee court held unconstitutional the use of HAC in such a case. Odom pushed a woman into her car and cut her in a robbery attempt. Angered when she called him "son," he raped her. She was still alive and talking as he then set about stealing her property and left. There were multiple stab wounds, including penetrating wounds to her heart, lung, and liver, which caused internal bleeding and death, and defensive wounds on her hands. There was a tear in the vaginal wall and semen in the vagina. The medical examiner said death was not immediate, but occurred "rather quickly." Id. 21-22. The court wrote that, to be constitutional, HAC must apply to torture or serious physical abuse beyond that necessary to produce death, specifically aligning itself with Florida and other states. Id. 25-26. It concluded that the facts did not put the crime within the "worst of the worst" and the circumstance did not apply. Id. 26-27.

As to the validity of a death sentence with only one

aggravator, appellee's brief shows that there is dicta in that regard in State v. Dixon, 283 So.2d 1 (Fla.1973), and the rule first applied in LeDuc. As noted above, LeDuc made no challenge to the sentence, so the case has little precedential value under Boyd v. Becker. The statute is clear, and appellee does not deny that it is for the Legislature to write the laws. A death sentence with only one aggravator is contrary to the statute and unconstitutional.

12. WHETHER THE COURT ERRED IN OVERRULING THE DEFENSE OBJECTION TO THE INTRODUCTION OF PHOTOGRAPHS OF DAWNIA DACOSTA DURING THE PENALTY PROCEEDINGS.

Appellant preserved his objection to exhibit B. When the state moved it into evidence, he renewed the objection made before penalty jury proceedings began; the judge noted the objection and let it in as exhibit 2, ST 446, which necessarily overruled the objection.[12] Appellant also preserved his objec-

[12] Cf. Simon v. State, 768 So.2d 1089 (Fla. 3rd DCA 1995) (denying 3.850 motion on merits "necessarily denied" motion for voluntary dismissal); State v. Perez, 802 So.2d 1167, 1168 (Fla. 3rd DCA 2002) (challenge to downward departure sentence preserved when judge "noted the objection" before entering sentence); State v. Rosa, 774 So.2d 730, 731, n. 2 (Fla. 2nd DCA 2000) (issue preserved when judge said, "The record will reflect the state's objection."); Williams v. State, 414 So.2d 509, (Fla. 1982) (same; judge disagreed with defendant's argument and "duly noted" objection). Armstrong v. State, 642 So.2d 730, 740 (Fla.1994) and Richardson v. State, 437 So.2d 1091 (Fla.1983) do not help appellee. Armstrong moved pretrial for a diagnostic test. The court reserved ruling, and he never renewed the motion. Richardson involved an untimely motion to strike evidence to which no objection had been made, and the judge did

tion to exhibit H. While counsel said he would "rather have H than G" as the less prejudicial of the two, T 2191, the court understood he objected to both H and G on the same ground, saying it was "inclined to disallow them both", T 2197, but, after more discussion, let them in "with the objection of the defendant noted." T 2199. Appellant renewed his objections to both G and H when they came in as State's 5 and 6. ST 446.[13] Appellee said G and H supported HAC as they answered the question of whether the murder was conscienceless and pitiless, T 2198-99; counsel disagreed, pointing to a case in his experience refuting the argument and concluding that the exhibits "are not going to answer that question." T 2199. The judge under-

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not acknowledge the motion. The purpose of the contemporaneous objection rule is to give the judge a chance to respond to the objection, and to bar counsel for gaining a tactical advantage by letting unknown errors to go undetected and then seeking a new trial. See J.B. v. State, 705 So.2d 1376, 1378 (Fla. 1998). These purposes were met at bar. It would be contrary to due process for the state to say for the first time on appeal that the ruling was not specific enough when it could have raised that matter at trial: in such a case, it is the state that gains a tactical advantage by letting a valid objection go unpreserved and then avoiding a second trial.

[13] The preservation is stronger than in Pacheco v. State, 698 So.2d 593, 595 (Fla. 2nd DCA 1997) ("The state first contends that Pacheco failed to preserve any issue about the admissibility of the taped statement because he did not object when the state introduced it. We disagree. The record shows that the court believed an objection had been made. When the prosecutor introduced the tape, the judge remarked 'I'm going to overrule the defense's objection.' Therefore, we address the merits of Pacheco's argument.")

stood counsel's argument, saying it was "very good". T 2200.

As to the standard of review at AB 86-87, appellant agrees that photographs involve the same standard as other evidence.

On the merits, appellant relies on his initial brief.

13. WHETHER THE DEATH SENTENCE AT BAR IS DISPROPORTIONATE.

Appellant disagrees that the cases at AB 96-97 apply. In Mansfield v. State, 758 So.2d 636, 642 (Fla.2000), the judge gave "very little" or "some" weight to the mitigators, less than was given at bar. This Court compared the case to Davis v. State, 703 So.2d 1055 (Fla.1997) as a case involving "slight" mitigation. 758 So.2d at 647. In Geralds v. State, 674 So.2d 96, 104-105 (Fla. 1996), the judge gave "little weight" or "very little weight" to the mitigation, so there was a "lack of substantial mitigation." Spencer v. State, 691 So.2d 1062 (Fla.1996) also involved minimal mitigation and this Court emphasized that Spencer had committed prior violent felonies against the victim and family members. Hence, it relied on Lemon v. State, 456 So.2d 885, 887-88 (Fla. 1984), in which the defendant also had committed prior violent felonies against women. 691 So.2d at 1065, text and footnotes.

14. WHETHER THE COURT ERRED IN ITS ASSESSMENT OF MITIGATING CIRCUMSTANCES.

Appellee has misunderstood appellant's argument. Appellant

agrees a judge may give minimal weight to mitigating circumstances for various reasons related to the case. He argues that it is contrary to law and reason to give little weight for a reason that can apply in every case, namely that the mitigator did not prevent the commission of the crime, or which is unrelated to the defendant's character or record or the circumstances of the offense. Appellee's cases do not address this issue.

15. WHETHER THE COURT ERRED IN FAILING TO COMPLY WITH MUHAMMAD v. STATE, 782 So.2d 343 (Fla.2001), IN SENTENCING APPELLANT.[14]

Pages 361-62 of Muhammad say: "The failure of Muhammad to present any evidence in mitigation hindered the jury's ability to fulfill its statutory role in sentencing in any meaningful way." The significant question is whether the jury's ability was hindered, rather than whether there was a waiver of all mitigation. The recommendation is reliable only so far as there is full presentation of the case for life. The record affirmatively shows that there was not a full presentation of the case for life. Defense counsel intended to present "a lot of witnesses", including members of appellant's family. ST 437, 439. Appellant's statement to the jury had little or nothing of

[14] Appellant's argument here addresses argument at AB 71-73.

mitigation, and the bishop told the jury that had convicted appellant that he deserved an Academy Award if he was guilty. The recommendation resulting from this proceeding was not reliable. Hence, while this is not a case of the defendant completely "not challenging the imposition of the death penalty and [refusing] to present mitigation evidence," as discussed at page 363 of Muhammad, the same procedure should apply.

CONCLUSION

Based on the foregoing argument and the authorities cited therein, appellant respectfully submits this Court should vacate the convictions and sentences, and remand to the trial court for a new trial or resentencing, or grant such other relief as may be appropriate.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy hereof has been furnished to Leslie T. Campbell, Assistant Attorney General, Ninth Floor, 1655 Palm Beach Lakes Blvd., West Palm Beach, Florida 33401 by mail 9 July 2004.

Attorney for Lucious Boyd

CERTIFICATE OF FONT COMPLIANCE

Counsel hereby certifies that the instant brief has been prepared with 12-point Courier New type, a font that is not spaced proportionately.

Of Counsel