IN THE SUPREME COURT OF THE STATE OF FLORIDA

SC CASE NO. SC09-1755
DCA CASE NO. 4D08-2098
L.T. No. 432007CF000625A

STATE OF FLORIDA,

Petitioner,

vs.

JOSEPH EUGENE McFADDEN,

Respondent.

PETITIONER'S AMENDED INITIAL BRIEF ON THE MERITS (WITH APPENDIX)

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PRELIMINARY STATEMENT

Petitioner, THE STATE OF FLORIDA, was the prosecution and Respondent, JOSEPH EUGENE McFADDEN, was the defendant in the Criminal Division of the Circuit Court of the Nineteenth Judicial Circuit, in and for Martin County, Florida. Petitioner was the Appellee and Respondent was the Appellant in the Fourth District Court of Appeal.

STATEMENT OF THE CASE AND FACTS

Respondent was charged with robbery with a deadly weapon (count one), burglary of a conveyance while armed (count two), third degree grand theft (count three), and aggravated battery (count four). Respondent was tried by jury, and found guilty of all counts as charged. Respondent was sentenced, as a prison releasee reoffender, to life in prison for counts one and two. He was sentenced to 15 years in prison on the aggravated battery charge. Count three was dismissed and the jury verdict was set aside.

Respondent filed a notice of appeal on May 16, 2008. (R.211). Respondent raised four allegations. One of those allegations dealt with an alleged discovery violation. The Fourth District Court of Appeal (Fourth DCA) reversed this case and remanded it for a new trial. McFadden v. State, ___So.3d,___, 2009 WL 2031286 (Fla. 4th DCA), 34 Fla. L. Weekly D 1431 (Fla. 4th DCA July 15, 2009). The Fourth DCA focused its

attention on Respondent's claim that a discovery violation had occurred.

In this case, a detective testified on rebuttal about a conversation that he had with a witness (Respondent's sister) on the day before the crimes in this case occurred. Respondent objected, claiming that the State committed a discovery violation because the statement had never been disclosed to the defense. The Fourth DCA held that the State committed a discovery violation by failing to comply with Rule 3.220(b)(1)(B), Florida Rules of Criminal Procedure, and thus reversed for a new trial. Id.

In its opinion, the Fourth DCA ruled as follows:

> The State argues that rule 3.220(b)(1)(B) did not cover the **oral** statement of the police detective because it was not a **written** statement. The rule's operative term is **includes** ("term 'statement' as used herein **includes**..."). The State would have us understand that **includes** is here synonymous with **comprise**. We reject this interpretation.

(Emphasis in the original.). Id. Further, the Fourth DCA extensively discussed the definition of the term "includes," and ultimately found that the State's position would produce an "unnecessary ambiguity." Id.

Petitioner now seeks review of the lower court's decision in this case.

SUMMARY OF THE ARGUMENT

The Fourth District Court of Appeal's decision in this case is contrary to numerous cases dealing with the application of Rule 3.220(b)(1)(B), Florida Rules of Criminal Procedure. Rule 3.220(b)(1)(B) involves whether an oral and unwritten statement is discoverable. It is Petitioner's contention that there was no discovery violation made by the State when the prosecutor did not reveal an oral statement that the Respondent's sister made to a deputy who then revealed that statement to the prosecutor in this case. This Court should reverse the Fourth District Court of Appeal's decision.

ARGUMENT

THE STATE DID NOT COMMIT A DISCOVERY VIOLATION WHEN IT DID NOT DISCLOSE AN ORAL STATEMENT THAT THE DEFENDANT'S SISTER MADE TO DEPUTY RAY WHICH WAS THEN DISCLOSED TO THE PROSECUTOR.

I. Standard of review

Rulings on discovery and evidentiary issues are generally left to the discretion of the trial court and are reviewable under the abuse of discretion standard. Tomengo v. State, 864 So. 2d 525 (Fla. 5th DCA 2004). See e.g., State v. Tascarella, 580 So. 2d 154 (Fla. 1991).

II. Discussion

Petitioner contends that there was no discovery violation made by the State when the prosecutor did not reveal an oral statement that the Respondent's sister made to a deputy who then revealed that statement to the prosecutor in this case.

On direct examination by the defense, Bakesa McFadden, Respondent's sister, testified that there has never been a shotgun in their house. (T. 509). During cross-examination of Ms. McFadden, the State alleged that the defense opened the door by asking Ms. McFadden whether there had ever been a shotgun in the house. (T. 509).

> MS. NICHOLS (Prosecutor) Q. Ma'am, could I ask you what that last statement was you made?

A. I said there’s never been a gun in our house if that’s what you’re talking about.

Q. Your Honor, may we approach?

COURT: Yes, you may.

(BENCH CONFERENCE)

COURT: I’m...

MS. NICHOLS: They just...

COURT: Hearing an oops.

MS. NICHOLS: Opened the door.

MR. ROODHOF (Prosecutor): They just opened the door, Judge, we have a, we believe that she’s made a statement to another deputy and complained the night before about having guns in the rest of the house. She complained to a deputy, she wanted them, her brother had guns and drugs in the house, she just stated that there’s no guns in there ever (INDISCERNIBLE)...

COURT: Okay.

MR. ROODHOF: (INDISCERNIBLE).

COURT: Um...

MS. NICHOLS: It’s, this is the deputy that...

COURT: Who’s the deputy?

MS. NICHOLS: It’s Deputy Ray, that’s why she called him the next night because it had happened just the night before, so she called and said she (INDISCERNIBLE)...

COURT: Okay, what’s, what’s your response?

MS. RINEHART: Okay, that’s, the report that I have from Deputy Ray indicates that she called um, to say that there were speakers, there, the stolen merchandise was found by the house, nothing about guns.

COURT: But that was the next day...

MS. NICHOLS: Yeah.

COURT: Right, am I understanding that?

MS. NICHOLS: That’s why she called him and asked for him specifically because...

COURT: Because the night before...

MS. NICHOLS: He had spoke with the night before and she said she...

COURT: Well, let’s hear what the deputy, let’s is the deputy here?

MS. NICHOLS: He will be shortly.

COURT: He will be shortly. Have you contacted him?

MS. NICHOLS: We didn’t know she was gonna say that.

COURT: Um, all right, call him, call him, I need to hear what he has to say first, but call him and get him here.

MS. NICHOLS: I’m sorry?

COURT: Call him and get him here. Call the deputy.

MS. NICHOLS: Maybe I can ask her about that though, right?

COURT: Ah, if you have a good faith belief that she the day before had called and asked, I, I think the door is open to ask the question. When you call a witness is your choice.

MS. NICHOLS: What I would, I would prefer to do is talk to Deputy Ray before I do that...

COURT: All right, that’s probably a real good thing to do.

MS. NICHOLS: Instead of causing a delay.

COURT: Okay.

MR. ROODHOF: We need him right now though.

COURT: That’s fine, we’ll take a short recess, talk to him, make, verify the information. Um, there is an issue on whether the drugs come in, but just the alcohol...

MR. ROODHOF: We’re just gonna mention the gun.

COURT: You’re just gonna mention the gun, okay, cause that hasn’t been opened. Um...

***

COURT: On the record. Are you ready to proceed?

MS. NICHOLS: No, um, ah, should we approach or...

MR. ROODHOF: (INDISCERNIBLE).

COURT: No, you can...

MS. NICHOLS: Your Honor, ah...

COURT: Go ahead.

MS. NICHOLS: The issue is we were sending somebody by his house cause he’s not answering the phone. What we would like to do is ah, ah, plan on doing closings after lunch ah, come back with the caveat that we may recall her and um, if we can get a hold of him.

MR. ROODHOF: In other words finish the cross...

COURT: Right, I understand.

MR. ROODHOF: At this point, but then we may after lunch bring her back and have the deputy...

COURT: If you need, if you feel the need?

MR. ROODHOF: If we need, if we need to.

COURT: Okay. That sounds fine, so we’ll take a break probably by 11:30, we’ll just have the jury come back

> at 1 o’clock. Um, we can take a few moments to do the jury instructions this morning, okay, that’s fine and we’ll just wrap up this afternoon, that’s fine. We could have the jury come back.

(T. 509-513).

The matter was postponed and continued later on once the State put their rebuttal witness, Deputy Robert Ray, on the stand.

> Q. And do you remember having a conversation with an individual ah, later known to you as Bakesha Ford McFadden?
>
> A. Yes, I do.
>
> Q. And ah, when you spoke with Miss Fadden, Miss McFadden did she ever express any concerns about her brother Joseph McFadden?
>
> A. Yes, she did.
>
> Q. And specifically did she express a concern about what she described as, quote unquote, fire?
>
> A. Yes, she did, I had her elaborate on it and she was referring a sawed off shotgun.
>
> Q. Okay. What did she say about that?
>
> A. Ah, she was concerned that he had it in possession and she was, didn’t want it in her household.
>
> MS. RINEHART: Objection, Your Honor, can we approach please?
>
> (BENCH CONFERENCE)
>
> MS. RINEHART: I am of the opinion that this is a discovery violation, this is, this was not disclosed to us that he ever had any conversation with her about a, the material part of this case being that she...

COURT: I, I'm gonna ask, but in a rebuttal it's not necessarily discoverable, anything, everything is potentially (INDISCERNIBLE).

MS. RINEHART: (INDISCERNIBLE).

COURT: I'll overrule the objection because ah, in a, in a rebuttal, of course this one party doesn't know what the other party's gonna do and in, in the case of the Defense witness and therefore...

MS. NICHOLS: And...

COURT: Um, anything is potentially rebuttal.

MS. NICHOLS: And just to put something on the record, Miss McFadden came into our office day before yesterday, I had her read her depo, I asked her if there was anything additional about this case that she knew, she said no, nothing had changed. I said I know the Defense is calling you, is there anything else that you ah, know you're testifying about, she said no.

COURT: Okay. And, and I, I assume you're referring to that there are no guns in the house statement?

MS. NICHOLS: I'm sorry?

COURT: That there are no guns in the house, there's never been any guns in there, right?

MS. NICHOLS: No, I hadn't, I hadn't even thought of that, what I was referring to was any other facts about the case, it never entered my mind she'd say that on the stand.

COURT: Okay, all right, well, I'm overruling the objection.

MS. RINEHART: Ah, and Your Honor...

MS. RINEHART: I just, for the record I will object to this as being hearsay also. Um, a state, whatever statements Miss McFadden made to him um, are hearsay.

COURT: Okay, well, um, response. Hearsay?

> MR. ROODHOF: Hearsay, Judge, it's a it's a prior statement that she made.
>
> COURT: Okay, so it's an exception?
>
> MR. ROODHOF: Yes sir.
>
> COURT: Okay, I just wanna hear a response. All right, overruled.

(T. 533-535)(emphasis added). As seen above, the trial court inquired into the issue and ultimately determined that no discovery violation had taken place.

Rule 3.220(b)(1)(B), Florida Rules of Criminal Procedure, requires the State to reveal:

> (B) the statement of any person whose name is furnished in compliance with the preceding subdivision. The term "statement" as used herein includes a written statement made by the person and signed or otherwise adopted or approved by the person and also includes any statement of any kind or manner made by the person and written or recorded or summarized in any writing or recording. The term "statement" is specifically intended to include all police and investigative reports of any kind prepared for or in connection with the case, but shall not include the notes from which those reports are compiled.

Further, Rule 3.220(b)(1)(B) requires the State to reveal:

> (C) any written or recorded statements and the substance of any oral statements made by the defendant, including a copy of any statements contained in police reports or report summaries, together with the name and address of each witness to the statements.

"In determining which share of meaning to give to the word 'include,' the intention of the Legislature must be gathered from the context and from the statute as a whole, and such interpretation should be given as is consonant with reason and sound judgment." People v. Fisher, 145 Misc. 406, 261 N.Y.S. 390 (N.Y. 1932).

In its opinion, the Fourth DCA cited to the H.W. Fowler, Dictionary of Modern English US-AGEE (2d ed.) 275, to interpret the word "includes" in Rule 3.220(b)(1)(B). The Fourth DCA also relied upon the American Heritage Dictionary (3rd ed.) to interpret the meaning of the word "includes." The Court stated:

> The State argues that rule 3.220(b)(1)(B) did not cover the **oral** statement of the police detective because it was not a **written** statement. The rule's operative term is **includes** ("term 'statement' as used herein **includes**..."). The State would have us understand that **includes** is here synonymous with **comprise**. We reject this interpretation.

(Emphasis in the original.). Id. The Fourth DCA extensively discussed the definition of the term "includes," and ultimately found that interpreting the word "includes" with the word "comprise" would produce an "unnecessary ambiguity." Id.

However, a different interpretation of the word "includes" comes from the on-line Merriam-Webster Online Dictionary 2010. This secondary authority defines "include" as: 1. To shut up, enclose, to take in **or comprise** as a part of a whole or group,

to contain between or within. Merriam-Webster Online Dictionary, 21 Jan. 2010 (emphasis added).

It is the State's position that Rule 3.220 does not include unwritten oral statements. As may be seen from the Merriam-Webster Online Dictionary, one definition of "includes" is "to comprise." As will be discussed, there are many cases which determine that an oral statement is not covered under the rule. Rule 3.220 only covers written statements or oral statements that are memorialized by mechanical recording. The statement in question does not fall under the list of statements that are discoverable. The oral statement passed on to the prosecutor could be considered as having come from an informal police report or police officer's "notes."

In Breedlove v. State, 413 So. 2d 1, 4 (Fla. 1982), this Court discussed whether or not police reports were discoverable per se as "statements." According to this Court, "[t]he courts of this state have generally held that police reports are not 'statements,' except of the officers making them, and that generally they are not discoverable per se as statements of those officers. (citations omitted)." Id. at 4.

> The material in the instant reports does not comprise 'statements' because the reports have not been signed, adopted, or approved by the persons (other than the officers) to whom they have been attributed, they do not appear to be substantially verbatim, and they were not recorded contemporaneously with their making. We do not find that these reports

> are discoverable as 'statements' as set out in rule 3.220.

Id. at 5.

It is the Petitioner's position that the State was not required to reveal the oral statement made to Deputy Ray on the day before the instant offenses took place. The statement at issue was a statement that Ms. McFadden made to Deputy Ray the day before the instant offenses had occurred. (T. 532-533). In fact, Deputy Ray specifically testified that he did not include this statement in any written report. (T. 536). Thus, since the statement was not included in any written report, and was not a written statement by the witness or an oral statement of the Appellant, the statement was not discoverable. The trial court's ruling would have been right for the wrong reason, under the "tipsy coachman" rule. See Lowery v. State, 766 So. 2d 417 (Fla. 4th DCA 2000). As such, the trial court's ruling that the statement was not discoverable was right even if it was for the wrong reason.

In Watson v. State, 651 So. 2d 1159 (Fla. 1994), the defendant argued that the state withheld an oral statement made by its expert witness, and the trial court failed to conduct an adequate Richardson hearing. This Court disagreed with Watson's assertion that the expert's oral statement was discoverable. This Court held that:

> When we read Florida Rules of Criminal Procedure 3.220(a)(1)(ii)(1988) (footnote omitted) and 3.220(a)(1)(x) (1988), in tandem, we are lead to the conclusion that the reference to 'statements' is limited to written statements or contemporaneously recorded oral statements.

Id. at 1164. Rule 3.220(a)(1)(ii), Florida Rules of Criminal Procedure (1988) states in part:

> (ii) The statement of any person whose name is furnished in compliance with the preceding paragraph. The term "statement" as used herein means a written statement made by said person and signed or otherwise adopted or approved by him, or a stenographic, mechanical, electrical, or other recording, or a transcript thereof, or which is a substantially verbatim recital of an oral statement made by said person to an officer or agent of the State and recorded contemporaneously with the making of such oral statement…"

Similarly, since the oral statement in this case was not officially memorialized, it too was not discoverable.

In Burkes v. State, 946 So. 2d 34 (Fla. 5th DCA 2006), the Fifth District Court of Appeal held that the state's failure to disclose the rebuttal testimony of an investigator in a driving under the influence manslaughter case that the investigator visited the accident scene earlier that morning, fourteen months after the accident occurred, that paint marks he had placed on the roadway to show the marks left by the defendant's vehicle were no longer there, and that temporary paint only lasted two or three months, that contradicted defense witness's testimony that he viewed paint marks thirteen months after the accident

occurred, was not a discovery violation. The Fifth District held that this rebuttal testimony was not a "statement" within the meaning of the discovery rule requiring the state to disclose statements to defendant in discovery, as the rebuttal testimony had not been reduced to writing or recorded in a manner prescribed by Rule 3.220(b)(1)(B).

The Fifth District held that while the term "statement" includes all police and investigative reports, courts construing rule 3.220(b)(1)(B) have determined that **the State is not required to disclose to the defendant a witness's oral statement when such statement has not been reduced to writing or recorded in a manner prescribed by the rule**. **"To do otherwise would require the prosecutor to record and disclose virtually any case related conversation with an investigator."** Burkes v. State, 946 So. 2d at 37. (Emphasis added.).

> Florida Rule of Criminal Procedure 3.220(b)(1)(B) provides for discovery of written or recorded witness statements. The clear implication of this rule is that such statements, if not written or recorded, are not discoverable. In the event such written or taped statements are discovered pretrial by the defense, it is the preserved statement itself, and not the personal recollection of the state attorney present at the time, that may be used for purposes of impeachment.

Olson v. State, 705 So. 2d 687, 691 (Fla. 5th DCA 1998).

It is the Petitioner's contention that to require the State to disclose all oral statements made to the police or prosecutor

in passing would cause an unnecessary burden on the State. To do so would require the State to disclose virtually every single case-related statement made to a police investigator or a prosecutor.

Further, Petitioner maintains that the oral statement in question was actually part of the prosecutor's work product, and therefore, was not discoverable. Florida courts have repeatedly and consistently held that the contents of oral statements taken by attorneys from witnesses are nondisclosable work product. Horning-Keating v. State, 777 So. 2d 438, 443-444 (Fla. 5th DCA 2001). See Eagan v. DeManio, 294 So. 2d 639 (Fla. 1974) (investigative interviews of witnesses by state prosecutors are work product); Olson v. State, 705 So. 2d 687, 690 (Fla. 5th DCA 1998)("[t]he oral and unrecorded statements of witnesses to a state attorney are privileged as work product and not subject to discovery"); State v. Rabin, 495 So. 2d 257, 260-261 (Fla. 3d DCA 1986)(oral statements in a pretrial interview between criminal defendant's former spouse and his defense counsel "constituted protected work product").

The courts in this country have differentiated between oral and written statements of witnesses. State v. Rabin, 495 So. 2d 257, 261 (Fla. 3d DCA 1986). *See, e.g.*, Upjohn Co. v. United States, 449 U.S. 383, 399-402, 101 S.Ct. 677, 687-689, 66 L.Ed.2d 584, 5970599 (1981); Hickman v. Taylor, 329 U.S. 495, 67

S.Ct. 385, 91 L.Ed. 451 (1947); In re Grand Jury Investigation, 599 F.2d 1224, 1230-1231 (3d Cir. 1979). In Hickman, the Court stated that "as to oral statements made by witnesses to [the attorney], whether presently in the form of his mental impressions or memoranda, we do not believe that any showing of necessity can be made under the circumstances of this case so as to justify production." Hickman v. Taylor, 329 U.S. at 512, 67 S.Ct. at 394, 91 L.Ed. at 463.

> Under ordinary conditions, forcing an attorney to repeat or write out all that witnesses have told him and to deliver the account to his adversary gives rise to grave dangers of inaccuracy and untrustworthiness. No legitimate purpose is served by such production. The practice forces the attorney to testify as to what he remembers or what he saw fit to write down regarding witness' remarks. Such testimony could not qualify as evidence; and to use it for impeachment or corroborative purposes would make the attorney much less an officer of the court and much more an ordinary witness. The standards of the profession would thereby suffer.

Hickman v. Taylor, 329 U.S. at 512-513, 67 S.Ct. at 394, 91 L.Ed. at 463.

In Upjohn, the United States Supreme Court determined that forcing an attorney to disclose notes and memoranda of a witness' oral statements is disfavoured, and the federal discovery rule accords special protection to work product revealing an attorney's mental processes. Upjohn Co. v. United States, 449 U.S. 383, 399-402, 101 S.Ct. 677, 687-689, 66 L.Ed.2d 584, 5970599 (1981).

"Work product" can be divided into two different categories: (1) "fact" work product (i.e., factual information which pertains to the client's case and is prepared or gathered in connection therewith), and (2) "opinion" work product (i.e., attorney's mental impressions, conclusions, opinions, or theories concerning the client's case). Generally, fact work product is subject to discovery upon a showing of "need," whereas opinion work product is absolutely, or nearly absolutely, privileged. State v. Rabin, 495 So. 2d at 262 (footnote omitted). The difference between the degrees of protection given oral and written statements is based partially upon this distinction between fact and opinion work product. **Compelling disclosure of an attorney's notes or memoranda of oral statements tends to reveal an attorney's opinion work product**. State v. Rabin, 495 So. 2d at 262 (emphasis added); Upjohn Co. v. United States, 449 U.S. 383, 399-401, 101 S.Ct. 677, 687-689, 66 L.Ed.2d 584, 597-599 (1981)(emphasis added).

The courts have consistently recognized that an attorney has a significant privacy interest in non-disclosure of opinion work product. State v. Rabin, 495 So. 2d at 263. Also, it has been held that **notes of a conversation with a witness "are so much a product of the lawyer's thinking and so little probative of the witness's actual words**." State v. Rabin, 495 So. 2d at

263 (emphasis added). *See* In re Grand Jury Investigation, 412 F.Supp. 943, 949 (E.D. Pa. 1976).

In Johnson v. State, 545 So. 2d 411 (Fla. 3d DCA 1989), the Third District held that it was not reversible error for the trial court's failure to conduct a Richardson hearing on the state's failure to disclose to the defense an oral, unrecorded statement of a state witness made to the prosecuting attorney. The state was not required to reveal such a statement to the defendant under Fla.R.Crim.P. 3.220(a)(1)(ii), and thus, there was no discovery violation upon which to hold a Richardson hearing. Id. at 412. In a footnote, the Third District found that:

> FN1. The defendant's reliance on *Waters v. State*, 369 So. 2d 979 (Fla. 3d DCA 1979), is misplaced because that case involved the prosecutor's duty to disclose 'the substance of oral statements made by the accused' pursuant to Fla.R.Crim.P. 3.220(a)(1)(iii), which oral statements were disclosed through a change in a state witness' previous testimony. Here, the change of witness testimony complained of did not concern any statement made by the accused. Any duty of disclosure of such witness' testimony arises under Fla.R.Crim.P. 3.220(a)(1)(ii), which defines a discoverable 'statement' of such witness as *'a written statement* made by said person and signed or otherwise adopted or approved by him, or *a stenographic, mechanical, electrical,* or other *recording*, or a transcript thereof, or which is a *substantially verbatim* recital of an oral statement made by said person to an officer or agent of the state *and recorded contemporaneously* with the making of such oral statement...' Fla.R.Crim.P. 3.220(a)(1)(ii)(emphasis added).

Johnson v. State, 545 So. 2d at 412.

According to the Fourth District, "surprise is not what our discovery rules are intended to protect against. Neither side is required to alert the opposing party to the content of a witness' testimony, except to the extent a written or recorded, oral statement of the witness or expert witness' report may foreshadow what he will say on the stand." Whitfield v. State, 479 So. 2d 208 (Fla. 4th DCA 1985).

This Court has acknowledged that "Courts construing rule 3.220(b)(1)(B) have determined that the State is not required to disclose to the defendant a witness's oral statement when such statement has not been reduced to writing or recorded in a manner prescribed by the rule." State v. Evans, 770 So. 2d 1174, 1180 (Fla. 2000).

In the case *sub judice*, Respondent's sister called Deputy Ray the night before the offenses in this case occurred. She told the deputy that Respondent had a gun, and that she wanted the gun out of the house. Deputy Ray informed the prosecutor as to what Ms. McFadden told him. Ms. McFadden's oral statement to Deputy Ray was never memorialized in a written report or recorded mechanically. Further, Deputy Ray's relaying of this statement to the prosecutor also was not memorialized in a written report or recorded mechanically. It is the State's contention that this statement may be considered as the prosecutor's work product and thus is not discoverable.

Alternatively, if this Court should find that the prosecutor should have disclosed the statement to the Respondent, Petitioner maintains that this was harmless error. There was not a reasonable probability that the alleged discovery violation "materially hindered the defendant's trial preparation or strategy." State v. Schopp, 653 So. 2d 1016 (Fla. 1995).

Respondent was not procedurally prejudiced by the State's failure to reveal Ms. McFadden's oral statement in question. Ms. McFadden was a defense witness. Also, she was not an eye witness to the offenses charged. On direct examination, Ms. McFadden testified that there were never any guns in their house. She testified to this both during Respondent's case and rebuttal. (T. 508-509, 513, 538). During the rebuttal testimony, Ms. McFadden refuted Deputy Ray's own rebuttal testimony that Ms. McFadden had told him there were guns in the house. Ms. McFadden stated that, while she did speak to the deputy about the safety of her home, she did not remember talking to Deputy Ray about a shotgun. She testified under oath that she had not seen one. (T. 539-540). So, Ms. McFadden was able to rehabilitate her testimony during rebuttal.

Further, during a taped interview that was entered into evidence, Appellant told Detective Pat Colosano that, although he did not own a gun, his father might have a rifle (in the

house). (T. 419, 423, 424, 441). The fact that Appellant himself informed the police that there might be a rifle in the house, but that it was owned by his father, actually corresponds to Deputy Ray's rebuttal testimony that Ms. McFadden said there was a rifle in the house. Since this testimony actually corroborates Appellant's own taped statement, it was not error for the jury to hear it.

Therefore, since the defense was well aware that there would be some form of evidence that there could have been a rifle in the house, albeit allegedly belonging to Respondent's father, there was not a reasonable probability that the alleged discovery violation materially hindered Respondent's trial preparation or strategy.

CONCLUSION

Wherefore, Petitioner respectfully requests that this Honorable Court reverse the Fourth District's ruling in this matter and affirm Respondent's convictions and sentences.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing "Petitioner's Amended Initial Brief on the Merits (with Appendix)" has been furnished by courier to: Christine C. Geraghty, Esq., Assistant Public Defender, counsel for

Respondent, Criminal Justice Building, Sixth Floor, 421 3rd Street, West Palm Beach, Florida 33401, on February 2nd, 2010.

_____

Of Counsel

CERTIFICATE OF TYPE SIZE AND STYLE

The undersigned hereby certifies that the instant brief has been prepared with 12 point Courier New type, a font that is not proportionately spaced, on February 2nd, 2010.

_____

MYRA J. FRIED