

IN THE CIRCUIT COURT OF THE FIFTEENTH JUDICIAL CIRCUIT  
IN AND FOR PALM BEACH COUNTY, STATE OF FLORIDA

CASE NO: 04-15633CF10A  
JUDGE: LUCY CHERNOW-BROWN

STATE OF FLORIDA

Plaintiff,

vs.

OMAR LOUREIRO,

Defendant.

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**HONORABLE ANA I. GARDINER'S MEMORANDUM IN SUPPORT OF DENYING  
DEFENDANT'S MOTION TO DISMISS INDICTMENT AND/OR PRECLUDE THE  
STATE FROM SEEKING THE DEATH PENALTY**

COMES NOW Honorable Ana I. Gardiner, an interested party in this cause,<sup>1</sup> by and through her undersigned counsel, and hereby submits her response to Defendant's Motion to Dismiss the Indictment and/or Preclude the State from Seeking the Death Penalty. Respectfully, no viable grounds for dismissal exist. The Court must deny the Motion. As grounds therefor, Gardiner would aver as follows:

1. There are no Legitimate Grounds for Dismissal of the Indictment.

Dismissal is not an appropriate remedy in this cause inasmuch as, even "assuming the worst," as the Defendant alleges, that the judge and prosecutor engaged in ex parte communications during the trial and/or "conspired to have the Defendant executed" (an allegation that not only has no basis

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<sup>1</sup> While Judge Gardiner is not a party in this case, nonetheless she has an interest in the outcome because her alleged conduct, in-part, is the basis for the Defendant's motion.

in law or fact, but is, at least, borderline libelous), none of the factual conduct alleged by the Defendant is so shocking, egregious or outrageous as to rise to the level required for dismissal of the Indictment.

A judge's comments made to a prosecutor, at sidebar, as to why the prosecutor did not charge another person, have been held not be an improper ex parte communication because it had no bearing on the Court's treatment of the defendant during either trial or sentencing. Hurst v. State, 2009 WL2959204 (Fla September 12, 2009). Even where improper ex parte communication occurs, reversal (much less dismissal) is not automatic, especially where there is no suggestion that the judge did not act in a neutral fashion. Randolph v. State, 853 So.2d 1051 (Fla. 2003) (noting that a post-conviction court should consider the nature of the contact between the trial judge and prosecutor). Relief has been denied when no showing could be made that the judge's rulings or decisions were prejudicially affected by the communication – and that "relief" has been reversal for a new trial – not dismissal. Tompkins v. State, 872 So.2d 230 (Fla. 2003). No dismissal of an Indictment for even grossly or egregiously ex parte discussions has been granted in this or any other state – and the instant allegations fall far short from supporting such a result. The State in this cause generously concluded that the Defendant should have a new trial, more generously than the law would seem to support. A request for dismissal of the underlying Indictment on the same grounds is inappropriate, unsupportable, and urges a gross miscarriage of justice. See also Riechmann v. State, 966 So.2d 298, 317 (Fla. 2007) (where a capital defendant was not entitled to recusal of trial judge in post-conviction proceeding on ex parte communication that was not substantive, nor did it result in any improper or non-record material being considered by the court). Instantly, the alleged ex parte communication was historically based on two conversational incidents which had already occurred during the trial, and although admittedly insensitive, if it occurred, did not result in any improper or

non-record material being considered by the court, a standard adopted by the courts of this state. 966 So.2d 318.

In his motion, the Defendant broadly alleges that the judge and prosecutor engaged in “shocking outrageous, and egregious misconduct,” warranting dismissal of the Indictment because they engaged in ex parte communications during trial both telephonically and personally, by meeting at a local restaurant and bar during the trial and having drinks together, and that they talked about some aspects of the Defendant’s case that had already occurred, specifically the claims made by the defense that the Defendant had killed a gay victim who had allegedly made unwanted sexual advances, a juror’s reaction to photographs, and later contacted each other by telephone, and that such conduct warrants dismissal of an Indictment returned three years prior thereto. It should be noted that the juror referred to herein was excused and the remaining jurors individually questioned on their ability to put aside the excused juror’s reaction to the photograph and not permit it to affect their verdict. Moreover, it is, at least, questionable that these comments, if made, could even be considered to be “ex parte communication.” See Rose v. State, 601 So.2d 1181 (Fla. 1992), Canon 3A(4) Fla. Bar Code of Judicial Conduct, and In Re Inquiry Concerning a Judge: Clayton, 504 So.2d 394, 395 (Fla. 1987).

The alleged misconduct did not, nor is it alleged that it did undermine the fidelity of the guilt phase, nor most assuredly, the underlying Indictment. The jury’s verdict of First Degree Murder was unanimous and the same jury, by a vote of 11 to 1, recommended death. The Grand Jury is a statutorily created, independent, investigative body rooted firmly in the English Common law. There is no allegation that either the prosecutor, or the Grand Jury engaged in any improper conduct in returning the Indictment three years prior to the alleged misconduct. Honorable Ana I. Gardiner did not preside over the Grand Jury. The alleged misconduct occurred after the Defendant engaged in

years of pre-trial discovery, which ostensibly, uncovered no impropriety in the pre-Indictment investigation of the case or its presentment to the Grand Jury – nor is any impropriety alleged. There is not a scintilla of evidence that the return of this Indictment was predicated on any misdeed. Thus, dismissal presents an untenable remedy, both at law and factually.

The Defendant concedes that there is “no case factually on all fours” with the “worst imaginable scenario” in the instant cause, which empowers a trial court to dismiss a charging document due to prosecutorial or judicial misconduct because the judge and prosecutor engaged in ex parte communications three years subsequent to its return. There are also no cases on “all threes, twos or ones” with this proposition. The proper remedy for this alleged misconduct, if it even is qualifying misconduct, is exactly what was asked for by the Defendant, and has already been granted in this cause: that is, reversal and remand for a new trial. The Defendant could have selected, but failed to select, a different remedy request, that is dismissal in either one of two forums: the Florida Supreme Court or the Seventeenth Judicial Circuit, when he could have done so. Both would have unquestionably summarily denied the motions for the same reasons elucidated herein, but he did neither, despite the identical factual underpinnings of the instant cause. In essence, the Defendant is relying on the same evidence that he offered when he asked for, and was granted, a new trial with a new judge. The new trial already granted to the Defendant vitiates any prejudice which occurred due to the allegedly improper ex parte communication between the judge and prosecutor during his first trial. The appointment of a new judge and order for a new trial make the current proceedings pristine, and appropriately return the cause to the posture it enjoyed prior to trial, although three years after the Indictment was returned.

The Defendant avers that the depositions of Luciana Caligari and the affidavit of Sheila Alu, contain limited inconsistencies with the depositions of the judge and prosecutor and propounds that

this bolsters his argument that the Defendant's due process rights were violated. The Defendant's reliance upon the existence of silent "contacts (calls)" between the judge and prosecutor during trial as evidence of misconduct that "could be" categorized as outrageous and egregious, is seriously misplaced. The content of the calls has already been testified to, in sworn deposition, by the only two witnesses to these conversations. In their depositions of April 30, 2009, both Gardiner and the prosecutor categorically denied any discussion about the Defendant or his case during their calls to each other. (Gardiner Dep. 42-53); (Scheinberg Dep. 59-61). See Pinardi v. State, 718 So.2d 242, 246 (Fla. 5th DCA 2008) – holding that innocuous comments and content of ex parte telephone calls were unlikely to amount to a ground for post-conviction relief. This uncontroverted evidence, from the sole sources, eviscerates the speculative, unfounded and largely defamatory contention that there was a "conspiracy" between the judge and prosecutor to have this Defendant "found guilty and executed." Not one shred of evidence exists, nor could it exist, as to this inflammatory and baseless allegation, and the same may deserve some consideration as to sanctions by this Court, for such scurrilous and reckless statements about a former prosecutor and a sitting Circuit Court judge in a public forum. Nevertheless, such speculative assertions, especially in the face of direct evidence to the contrary, cannot support relief in any fashion. See Gore v. State, 964 So.2d 1257, 1267 (Fla. 2007).

The instant cause cannot be more factually dissimilar to the cases cited by the Defendant in his Motion. Unlike the entrapment cases upon which the Defendant relies, this Defendant is not claiming that evidence was manufactured against him at the inception of the case, (as in manufactured cocaine cases), at the meeting of the Grand Jury, before the return of the Indictment, or even that the prosecutor or judge fabricated evidence against him during trial. See Metcalf v. State, 635 So.2d 11 (Fla. 1994); State v. Finno, 643 So.2d 1166 (Fla. 4th DCA 1994); State v.

Williams, 623 So.2d 462 (Fla. 1993); State v. Palmer, 623 So.2d 472 (Fla. 1993). Neither has this Defendant pointed to anything that was done by the judge or prosecutor that would infect the return of the Indictment or would subsequently (as in intentional destruction of evidence or Sixth Amendment invasion cases) affect this Defendant's ability to defend himself. See State v. Herrera, 866 So.2d 151 (Fla. 4th DCA 2004); State v. Marks, 758 So.2d 1131 (Fla. 4th DCA 2000).

State v. Marks, is the most recent case wherein the Fourth District Court, subsequently affirmed by the Florida Supreme Court, dismissed criminal charges because of prosecutorial misconduct. Even in that case, the entire case was not dismissed, only the charges tainted by the prosecutor's misconduct, and that misconduct was far more egregious than what occurred in the instant cause. In Marks, the defendants filed a writ of common law cert objecting to the State's inspection of seized privileged attorney-client work product documents that had been seized by the police. The Fourth District Court granted the petition, ordered the prosecutor's inspection of the files stayed, and ordered the trial court to conduct an adversary hearing addressing the defendants' claims of attorney-client privilege, including the work product doctrine. Consequently, the prosecutor admitted to multiple ex parte conversations with the judge, which resulted in the judge issuing an order allowing the prosecutor to inspect the documents. Based upon the judge's oral ex parte order, the prosecutor began inspecting the files. The defendants "cried foul," sought to stay inspection, and moved to disqualify the trial judge. The trial judge denied the relief sought. The Fourth District Court disqualified the trial judge. The prosecutor argued to the successor judge that the defendants' "privilege argument" was moot because the "cat-was-out-of-the bag." The successor judge found that the prosecutor's violation of the Fourth District Court's stay order, coupled with the actual inspection of allegedly privileged documents undermined the fidelity of the prosecution of certain counts

directly affected by the stay order. Therefore, those counts were dismissed on the grounds of prosecutorial misconduct.

Comparatively, in this case, the alleged misconduct was nowhere as egregious as violating a pretrial appellate court order in an attempt to gain access to, or additional evidence against the Defendant. The alleged misconduct in this case was crass barroom conversation between two parties who should have had such a conversation. But the tenor of the conversation no matter how “politically incorrect,” does not warrant dismissal of the indictment.

## II. The Request for Preclusion of the Death Penalty is Inappropriate

The decision to seek the death penalty is a mixed question of law and fact. The decision to seek the death penalty rests within the sound discretion of the prosecutor applying the law relating to aggravating circumstances to the available credible evidence. For the future jury to be prohibited from considering the death penalty as punishment, this Court must find as a matter of law that the alleged misconduct so undermines a future penalty phase that death is not an option. The prosecution’s penalty phase evidence, as well as the Defendant’s mitigation evidence, was gathered long before the alleged insensitive conversations that are the basis of the Defendant’s motion. The trial prosecutor is longer employed by the State Attorney’s Office.

## III. The Court’s “Supervisory Power” is Unavailing

Regarding the “catch-all” argument that the alleged misconduct warrants dismissal of the case under the "supervisory powers" doctrine, the courts have held that is not a proper use of the supervisory powers. See State v. Murray, 443 So. 2d 955, 956 (Fla. 1984) (stating that [with] overzealousness or misconduct on the part of either the prosecutor or defense lawyer, it is proper for either trial or appellate courts to exercise their “supervisory powers” by registering their disapproval, or, in appropriate cases, referring the matter to The Florida Bar for disciplinary investigation). The

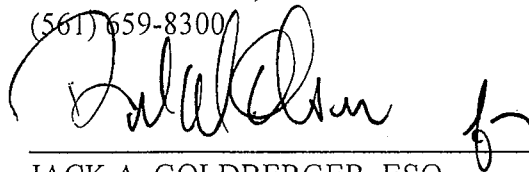
dismissal of criminal charges is not a proper sanction or registration of the Court's disapproval even assuming that the actions herein warrant the same.

Universally, there simply exists no legal ground to support the Defendant's theory that the proper remedy for the conduct complained of by Defendant is dismissal. No evidence is put forth that the allegedly ex parte conversation at the restaurant discussed any rulings or consideration in futuro by the Court, as in Rose, 601 So.2d 1181 (Fla. 1992), and even if it had, reversal, not dismissal would be the appropriate remedy. There is not one single case existent that conceivably would, or could support a dismissal of the Indictment on these bare facts.

WHEREFORE, in consideration of the above arguments, the interested party, Honorable Ana I. Gardiner, respectfully urges the Court to summarily deny the Defendant's Motion to Dismiss for failure to advance any position that, even if true, would warrant a dismissal, and set this matter for trial in due course.

**I HEREBY CERTIFY** that a true and correct copy of the foregoing was furnished this 29th day of October, 2009 to Brian Cavanaugh, Esq. and Scott Raft, Esq., Assistant State Attorney, 201 SE 6<sup>th</sup> Street, Room 670 Fort Lauderdale, FL 33301; Honorable Lucy Chernow Brown, Circuit Judge, 205 N. Dixie Highway, Room 10.2215, West Palm Beach, FL 33401; Michael Tenzer, Esq., 1312 S.E. 4<sup>th</sup> Avenue, Fort Lauderdale, FL 33316; Richard Rosenbaum, Esq, 200 E. Las Olas Boulevard, #1700, Fort Lauderdale, FL 33301; and Bruce Lyons, Esq., 1301 E. Broward Boulevard, Suite 220, Fort Lauderdale, FL 33301.

ATTERBURY, GOLDBERGER & WEISS, P.A.  
250 Australian Avenue South, Suite 1400  
West Palm Beach, FL 33401  
(561) 659-8300



JACK A. GOLDBERGER, ESQ.  
Florida Bar No: 262013

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**MOTION FOR LEAVE OF COURT FOR INTERESTED  
PARTY TO FILE MEMORANDUM IN SUPPORT OF DENYING  
DEFENDANT'S MOTION TO DISMISS INDICTMENT  
AND/OR PRECLUDE THE STATE FROM SEEKING THE DEATH PENALTY**

COMES NOW the Honorable Ana I. Gardiner, an interested party in this cause, and moves this Honorable Court for leave to file the attached Memorandum in Support of Denying Defendant's Motion to Dismiss Indictment and/or Preclude the State from seeking the Death Penalty, and would state as follows:

1. The Honorable Ana I. Gardiner, an interested party in these proceedings, based on the fact that her alleged conduct is the basis for the Defendant's Motion to Dismiss Indictment and/or Preclude the State From Seeking the Death Penalty.

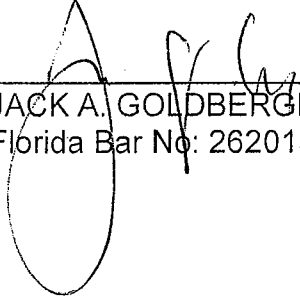
2. Because of the allegations in the Defendant's Motion, the Honorable Ana I. Gardiner, requests leave of court to file the attached Motion in these proceedings.

WHEREFORE, the Honorable Ana I. Gardiner, interested party in this cause, moves this Court to grant the aforementioned relief.

I HEREBY CERTIFY that a true and correct copy of the foregoing was furnished this

29<sup>th</sup> day of October, 2009 to Brian Cavanaugh, Esq. and Scott Raft, Esq., Assistant State Attorney, 201 SE 6<sup>th</sup> Street, Room 670 Fort Lauderdale, FL 33301; Honorable Lucy Chernow Brown, Circuit Judge, 205 N. Dixie Highway, Room 10.2215, West Palm Beach, FL 33401; Michael Tenzer, Esq., 1312 S.E. 4<sup>th</sup> Avenue, Fort Lauderdale, FL 33316; Richard Rosenbaum, Esq, 200 E. Las Olas Boulevard, #1700, Fort Lauderdale, FL 33301; and Bruce Lyons, Esq., 1301 E. Broward Boulevard, Suite 220, Fort Lauderdale, FL 33301.

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250 Australian Avenue South  
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