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IN THE CIRCUIT COURT OF THE SEVENTEENTH JUDICIAL CIRCUIT
BROWARD COUNTY, STATE OF FLORIDA

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

STATE OF FLORIDA

Plaintiff,

v.

OMAR LOUREIRO,

Defendant.

CLERK OF DISTRICT COURT
BROWARD COUNTY, FLORIDA

2009 OCT 19 PM 2:33

FELONY

**MOTION TO DISMISS INDICTMENT BASED UPON EGREGIOUS AND
OUTRAGEOUS JUDICIAL MISCONDUCT, EGREGIOUS AND OUTRAGEOUS
PROSECUTORIAL MISCONDUCT, OUTRAGEOUS GOVERNMENTAL
CONDUCT, AND THE BROAD EXERCISE OF THE COURT'S INHERENT
POWER AND/OR MOTION TO PRECLUDE THE STATE FROM SEEKING THE
DEATH PENALTY; REQUEST FOR EVIDENTIARY HEARING AND
INCORPORATED MEMORANDUM OF LAW**

COMES NOW the Defendant, OMAR LOUREIRO, by and through his undersigned counsel, and respectfully moves this Honorable Court for an Order Dismissing the Indictment or Precluding the State from Seeking the Death Penalty in this matter, and as grounds and in support therefore states as follows:

1. The Defendant, Omar Loureiro, whose date of birth is August 16, 1962, is charged with the First Degree Murder of James Lentry on January 1, 2001.
2. The State of Florida is seeking the death penalty in this matter.

A. PROCEDURAL HISTORY

3. On January 30, 2005, Omar Loureiro appeared in front of a Judge and was advised that as a result of the Indictment a no bond hold had been placed on him.

4. The Defendant entered a plea of not guilty and maintains his innocence.
5. The case proceeded to a jury trial.
6. The jury returned a guilty verdict.
7. Sentencing proceedings ensued, resulting in a recommendation by the jury that the death penalty should be imposed by a 11 -1 vote.
8. The Honorable Ana Gardiner, Circuit Judge (hereinafter referred to as "Judge Gardiner"), followed the jury's recommendation and sentenced Omar Loureiro to death.
9. On September 24, 2007 a Notice of Appeal was filed in the Florida Supreme Court on Omar Loureiro's behalf.
10. During the pendency of the appeal it was uncovered that Judge Gardiner and ASA Howard Sheinberg (hereinafter referred to as "ASA Sheinberg") engaged in egregious and outrageous misconduct which the Defendant believes constitutes outrageous judicial misconduct and outrageous prosecutorial misconduct warranting dismissal of the pending Indictment.
11. As a result of the revelation that the Judge and Prosecutor had, in the worst imaginable scenario, engaged in outrageous conduct during Omar Loureiro's trial, on October 29, 2008, a Motion to Relinquish Jurisdiction was filed on Omar Loureiro's behalf.
12. On November 21, 2008 Judge Gardiner entered a *sua sponte* Order of Recusal.
13. On March 31, 2009 an Order was entered by the Florida Supreme Court granting Omar Loureiro's request for relinquishment of jurisdiction.

14. On May 15, 2009, counsel for Michael J. Satz, State Attorney for the 17th Judicial Circuit, filed an Agreed Motion to Amend March 31, 2009 Relinquishment Order to Relinquish Jurisdiction to the Circuit Court for the Seventeenth Judicial Circuit (Broward County) so that an Agreed Motion to Vacate the Sentence and Conviction Can be Filed and a New Trial Ordered.
15. On May 19, 2009 the Florida Supreme Court entered an Order granting relinquishment.
16. Based upon an agreement between the State and defense that "an appearance of impropriety" existed surrounding Omar Loureiro's trial and sentencing proceedings, on May 22, 2009 an Order Vacating Conviction and Sentence of Omar Loureiro and ordering a new trial was entered.
17. On May 29, 2009 Omar Loureiro filed a Notice of Voluntary Dismissal and/or Suggestion of Mootness in the Florida Supreme Court.
18. On June 4, 2009 the Florida Supreme Court dismissed Omar Loureiro's direct appeal.
19. The State has refused to agree to waive the death penalty as a potential sentence and this Honorable Court has placed this matter "on track" for a retrial.
20. Counsel for Omar Loureiro advised this Court of the intent to conduct discovery to develop the facts to establish outrageous judicial conduct, outrageous governmental conduct, and violations of Omar Loureiro's state and federal constitutional rights to due process of law and to a fair trial.

21. During a recent hearing, the Court advised the parties to the effect of "assume the worst facts imaginable."¹
22. On September 30, 2009 an Order Setting Hearing on Defendant's Motion to Dismiss and Order to Transport Defendant, nunc pro tunc, to the Court's September 21, 2009, oral ruling. In said Order, the Court ordered, *inter alia*, "Defendant shall, for the purposes of his Motion to Dismiss, assume as true, in the light most favorable to Defendant, any all possible facts which could legally support a dismissal of the Indictment." (Order at pp. 1²). Additionally, in paragraph 6 of the Court's September 21, 2009 Order, the Court held that
- "There shall be no discovery with respect to the Motion to Dismiss pending, the [upcoming] hearing."
23. Omar Loureiro verily believes that the Indictment at bar should be dismissed and/or the State should be precluded from seeking the death penalty based upon the grounds set forth herein.

B. BRIEF STATEMENT OF FACTS

James Lentry was found stabbed to death in his bedroom around 8 or 9 a.m. on January 2, 2001. Omar Loureiro had been drinking with Lentry the night before, but no physical evidence linked him to the stabbing.^{3/4} The state presented a taped statement

¹ Defense counsel are awaiting receipt of a transcript of the hearing conducted on September 21, 2009 to ascertain the precise language utilized by the Court.

² The defense has honored the Court's Order, although Omar Loureiro objects to the Court's ruling precluding lawful discovery.

³ No fingerprints matched appellant, there was no DNA testing, no bloody knife or object was found, and there was no evidence of someone walking around dropping blood or leaving a blood trail. (R14 1052, 1056-57; R15 1180).

in which Omar Loureiro said Lentry tried to rape him and he stabbed Lentry in self-defense and did not mean to kill him. That was the crux of the State's evidence.

Death was by multiple stab wounds and sharp force trauma (R14 1036). Lentry had a blood alcohol level of 0.22%, he weighed 230 pounds, was 71 inches tall, and had cirrhosis of the liver (R14 1037).

C. GROUNDS FOR DISMISSAL OR PRECLUSION OF THE DEATH PENALTY

Omar Loureiro moves to dismiss the Indictment or preclude imposition of the death penalty based upon the following grounds:

1. Omar Loureiro's state and federal constitutional rights to due process of law and to a fair trial were violated;
2. Judge Gardiner engaged in outrageous judicial conduct;
3. ASA Sheinberg engaged in outrageous prosecutorial misconduct;
4. Law enforcement engaged in outrageous governmental conduct;
5. Judge Gardiner and ASA Sheinberg engaged in improper *ex parte* communications concerning this case during the pendency of the trial and sentencing process;
6. Dismissal is warranted under the Court's supervisor power.; and
7. The State should be precluded from seeking the death penalty to deter judicial, prosecutorial and governmental misconduct.

⁴ References are to the Record on Appeal, by Volume # and page #.

D. ARGUMENTS

I. OMAR LOUREIRO'S STATE AND FEDERAL CONSTITUTIONAL RIGHTS TO DUE PROCESS OF LAW AND TO A FAIR TRIAL WERE VIOLATED AS THE JUDGE AND PROSECUTOR'S ACTIONS WERE "SHOCKING"

Pursuant to the Fifth Amendment to the United States Constitution:

No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger, nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation.

Fifth Amendment, U.S. Constitution.

Sub judice, "assuming the worst scenario" vis-à-vis Judge Gardiner and Assistant State Attorney Howard Sheinberg during Omar Loureiro's trial, their actions are shocking to the universal sense of justice. They engaged in *ex parte* communications during trial. They engaged in grossly inappropriate conduct. They met in a local bar/restaurant during the trial and had drinks together. They talked and laughed about Omar Loureiro's case in the presence of others. See Affidavit of Sheila Alu⁵, attached hereto as Exhibit "A", and the deposition of Lucianna Calegari, attached hereto as

⁵ Interestingly, Ms. Alu, a Sunrise Commissioner and State Prosecutor, admitting she was assisting the FBI since 2005. In a SunSentinel newspaper article which was published the day before this Motion was submitted, Ms. Alu was characterized as admitting to not "wearing a wire," but instead, utilizing her cell phone as a recording device, and that the FBI was accessing all of her recordings. Query: Did Ms. Alu record any of the events of March 23, 2007 which the Judge and Prosecutor discussed substantive matters concerning this case – and laughed and joked about them. If so, Ms. Alu and Luciana Calegari are correct in their testimony. If true, the Judge and Prosecutor gave false statements when deposed. Does that make this matter more outrageous?

Exhibit "B". They laughed at allegations that Omar Loureiro was gay and killed a gay lover. Further, Ms. Alu's affidavit and the civilian's deposition establish blatant inconsistencies and contrary accounts of the events which transpired at Timpano's than the Judge or Prosecutor's.

The law is well settled that pursuant to the Fifth Amendment, dismissal of charges are appropriate when an accused individual is denied "fundamental fairness, shocking to the universal sense of justice." *United States v. Russell*, 411 U.S. 423, 432 (1973); *Kinsella v. Singleton*, 361 U.S. 234, 246 (1960); *Betts v. Brady*, 316 U.S. 455, 462 (1942).

A proceeding is fundamentally unfair under the Due Process Clause only if it is "shocking to the universal sense of justice." *United States v. Tome*, 3 F.3d 342, 353 (10th Cir. 1993) (*quoting United States v. Russell*, 411 U.S. 423, 432 (1973); *Hunter v. Franklin*, __F. Supp. __ (N.D.Okla. 8-3-2009); *King v. Province*, __F. Supp. __ (N.D. Okla 4-3-09).

Due process of law is a constitutional guarantee of respect for personal rights which are "so rooted in the traditions and conscience of our people as to be ranked as fundamental." *Snyder v. Massachusetts*, 291 U.S. 97, 105, 54 S.Ct. 330, 78 L.Ed. 674 (1934). Due process of law imposes upon the court the responsibility to conduct "an exercise of judgment upon the whole course of the proceedings in order to ascertain whether they offend those canons of decency and fairness which express the notions of justice." *Malinski v. New York*, 324 U.S. 401, 416-17, 65 S.Ct. 781, 788-89, 89 L.Ed. 1029 (1945).

The United States Supreme Court has stated that defining the limits of due process is difficult because "'due process,' unlike some legal rules, is not a technical conception with a fixed content unrelated to time, place and circumstances." *Joint Anti-Facist Refugee Comm. v. McGrath*, 341 U.S. 123, 162, 71 S.Ct. 624, 643, 95 L.Ed. 817 (1951) (Frankfurter, J., concurring). Rather, due process is a general principle of law that prohibits the government from obtaining convictions "brought about by methods that offend 'a sense of justice.'" *Rochin v. California*, 342 U.S. 165, 173, 72 S.Ct. 205, 210, 96 L.Ed. 183 (1952).

"Assuming the worst", that the Judge and the Prosecutor engaged in *ex parte* contact personally and telephonically at all hours of the day and night, Omar Loureiro's due process rights have been violated and the charge against him should be dismissed.

II. JUDGE GARDINER ENGAGED IN OUTRAGEOUS JUDICIAL MISCONDUCT

"Assuming the worst" as this Court has required, Judge Gardiner's misconduct in this case was outrageous and egregious. This extreme judicial misconduct should result in dismissal of the Indictment.

In order to show judicial misconduct, an accused must show that "the conduct of the trial court is `egregious, and fairly capable of characterization as beyond that necessary to fulfill the role of governor of the trial for the purpose of assuring its proper conduct and of determining questions of law.'" *Todd v. Stegal*, 40 F. App'x 25, 27 (6th Cir. 2002) (quoting *United States v. Tilton*, 714 F.2d 642, 645 (6th Cir. 1983)). The trial Judge's conduct must be examined in the context of the entire trial "to determine

whether the behavior was so prejudicial as to violate due process." *Harrington v. Iowa*, 109 F.3d 1275, 1280 (8th Cir. 1997); *Rafferty v. Hudson*, ___ F. Supp 3d ___ (N.D. Ohio 7-14-2009).

This is a case of blatant judicial misconduct. The misconduct resulted in a death sentence. Again, the state seeks the most severe sanction. In turn, the most severe sanction of dismissal is warranted.

III. DISMISSAL OF THE INSTANT INDICTMENT IS WARRANTED BASED UPON OUTRAGEOUS PROSECUTORIAL MISCONDUCT

"Assuming the worst", the events at bar constitute egregious and outrageous misconduct warranting the ultimate sanction, dismissal of the Indictment.

As stated by the Second Circuit,

[P]rosecutorial misconduct cannot give rise to a constitutional claim unless the prosecutor's acts constitute `egregious misconduct.

Miranda v. Bennett, 322 F.3d 171, 180 (2d Cir. 2003); *see also Floyd v. Meachum*, 907 F.2d 347, 353 (2d Cir. 1990) ("The appropriate standard of review for a claim of prosecutorial misconduct is the narrow one of due process, and not the broad exercise of supervisory power.") (internal quotations and citations omitted).

At bar, the Judge and Prosecutor engaged in egregious misconduct. The same is assumed and can be proven at an evidentiary hearing if necessary.

IV. LAW ENFORCEMENT ENGAGED IN OUTRAGEOUS GOVERNMENTAL MISCONDUCT

The Defendant was illegally brought to Florida from Nicaragua pursuant to an arrest warrant signed on August 9, 2002. He was arrested, tried and sentenced in Nicaragua on unrelated matters and was serving his sentence in a Nicaraguan prison. Nicaraguan officials advised Broward Sheriff's office of the above.

While inquiries were made regarding seeking extradition to the United States for the murder charges, no official action was ever taken to begin the process of extradition of Mr. Loureiro. Nicaragua will not extradite someone for criminal prosecution if the country seeking extradition is seeking the death penalty.

Mr. Loureiro successfully appealed his Nicaraguan conviction and, on January 28, 2005, was released from prison. Local Nicaraguan officials advised the United States Embassy that he was being released. While on the way to his residence, members of the Nicaraguan police illegally stopped his vehicle, presented no papers or documentation to support the stop, and over Mr. Loureiro and Mr. Roger Cardenas' protestations took Mr. Loureiro into custody. Mr. Loureiro was taken to a local jail where he was held and advised that he was going to be expelled from the country. However, such a process requires certain due process requirements and none were provided to Mr. Loureiro.

The United States Embassy became involved and two of it's security agents placed Mr. Loureiro on a plane to Miami, Florida, and accompanied him to Miami where he was turned over to Detectives Berrena and Ilarazza. Mr. Loureiro, while in Nicaragua, married on May 30, 2002 to Ms. Lesbia Robletto, a Nicaraguan citizen, which marriage preceded his incarceration on the Nicaraguan charges for which he was imprisoned. The arrest for the Nicaraguan charges was on July 18, 2002.

Under Nicaraguan law, the expulsion process is an immigration issue and is used by the government to deal with aliens who present a threat or exhibit conduct that the government feels warrants that person from remaining in the country. Such a process

requires certain due process considerations which were not provided to Mr. Loureiro. They include, but are not limited to, a hearing on the issues for which the government seeks to expel an individual. Although Mr. Loureiro was not a Nicaraguan citizen, he was married to one and he was entitled to his rights to fight the expulsion process.

Even for purposes of argument that the expulsion was proper, under Nicaraguan law, the person seeking to be expelled is given an option as to what country he wishes to go and, if no such option is appropriate or exercised, then the person is to be expelled to the country from where the person came when entering Nicaragua and in this case that country was Costa Rica.

Attached to this Motion as Exhibit "C" (Spanish) and Exhibit "D" (English translation) are the findings of Mr. Omar Cabezas Lacayo from the Office of the Attorney General for the Defense of Human Rights. This document outlines the violations of law which led to the illegal expulsion of Mr. Loureiro to the United States.

The State of Florida should not be entitled to seek the death penalty where its agents and or agents of the United States on its behalf and its request, illegally obtain and have that person brought into this country. Proper procedures should have been followed in obtaining Mr. Loureiro to answer the instant Indictment in Florida. Those procedures were not followed here, in that extradition proceedings were never brought.

Further, such procedures were not followed in Nicaragua where the defendant was illegally turned over to the United States authorities and illegally transported to Florida.

