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

STATE OF FLORIDA

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

Plaintiff,

v.

OMAR LOUREIRO,

Defendant.

FILED  
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."<sup>1</sup>
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. 1<sup>2</sup>). 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.<sup>3/4</sup> The state presented a taped statement

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<sup>1</sup> 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.

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

<sup>3</sup> 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.

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<sup>4</sup> 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 Alu<sup>5</sup>, attached hereto as Exhibit "A", and the deposition of Lucianna Calegari, attached hereto as

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<sup>5</sup> 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 its 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.

Further, the United States Embassy officials knew of the proper procedures to follow, ignored those procedures, acted with and on behalf of the Broward Sheriff's office to circumvent the legal process and obtained the person of Mr. Omar Loureiro illegally.

Here, only limited facts have been established, although "assuming the worst," egregious misconduct warrants dismissal of the charge.

"While there may be circumstances in which the conduct of law enforcement agents is so outrageous that due process bars the government from invoking the judicial process to obtain a conviction, the level of outrageousness needed to prove a due process violation is quite high, and the government's conduct must shock the conscience of the court." *Id.* (citing *United States v. Russell*, 411 U.S. 423, 431-32, 93 S.Ct. 1637, 36 L.Ed.2d 366 (1973)) (internal quotation omitted); *United States v. Nieman*, 520 F.3d 834 (8th Cir. 2008). The contact between Judge Gardiner and Assistant State Attorney Howard Sheinberg was so shocking, Omar Loureiro's due process rights were violated.

Omar Loureiro recognizes that

Dismissal of an indictment on the ground that the government engaged in outrageous conduct requires a defendant to show from the totality of the circumstances that the government's conduct and over-involvement "violated that fundamental fairness, shocking to the universal sense of justice, mandated by the *Due Process Clause of the Fifth Amendment.*" *United States v. Russell*, 411 U.S. 423, 432 (1973) (quotation marks omitted). The defense can be invoked only in the "rarest and most outrageous circumstances." *United States v. Nyhuis*, 211 F.3d 1340, 1345 (11th Cir. 2000); *United States v. Haimowitz*, 725 F.2d 1561, 1577 (11th Cir. 1984).

*United States v. Fernandez*, 07-13882 (11th Cir. 3-3-2009).

While undersigned counsel has been unable to locate any case factually “on all fours” with the worst imaginable scenario, it is clear that the court has the power to dismiss the Indictment at bar based upon the violation of due process.

The Prosecutor and Judge have already admitted to “an appearance of impropriety” causing reversal and remand for a retrial. In actuality, because of the egregious and offensive violations of the law, the Judicial Code and the Florida Bar Rules Regulating ethics, this case is a blatant example of judicial and prosecutorial improprieties. Here, the *ex parte* contact was with the homicide prosecutor, during Omar Loureiro’s trial.

In an analogous but less egregious situation, in *State v. Williams*, 623 So.2d 462 (Fla. 1993), the Supreme Court held that the illegal manufacture of crack cocaine by the police for use in a reverse-sting operation constitutes governmental misconduct that violates the due process clause of the Florida Constitution. In *Williams*, the court reversed the defendant's conviction for purchasing the manufactured crack cocaine. See also *State v. Palmer*, 623 So.2d 472 (Fla. 1993) (*reversing* Palmer's conviction because the cocaine used in the reverse-sting had been illegally manufactured by law enforcement officials).

In *Metcalf v. State*, 635 So.2d 11 (Fla. 1994), the defendant was charged with solicitation to deliver cocaine which the sheriff's office had manufactured for use in a reverse-sting operation. The court reversed Metcalf's conviction and found that the Broward County Sheriff's Office's illegal manufacture of crack cocaine for use in a reverse-sting operation was misconduct which violated Metcalf's due process rights. In

*Metcalf*, the court found no distinction between the purchase of illegally manufactured cocaine, as in *Williams*, and the solicitation to deliver that drug, in regard to whether a due process violation occurs:

Although the defendant in *Williams* was convicted of purchasing cocaine, the Court's holding was not limited to buying illegally manufactured drugs. The court held that it was law enforcement's illegal manufacture of crack cocaine for use in a reverse-sting operation that violated due process — and not just the purchase of that cocaine. As the court said in *Williams*, "[t]he illegal manufacture of crack cocaine by law enforcement officials violates this Court's sense of fairness and similar justice." *Williams*. at 467; *Metcalf*, 635 So.2d at 13.

Another similar due process violation occurs in entrapment cases, such as *State v. Finno*, 643 So.2d 1166 (Fla. 4th DCA 1994). In *Finno*, the police investigated the Finno brothers after receiving a tip from an informant that the Finnos were plotting to commit murder. After months of investigation revealed no murder plot, the police, through their informant, taught the Finnos how to set-up a loan sharking scheme. The Finnos were charged with various crimes related to the loan sharking operation. This court reversed the conviction on the ground that the Finnos were entrapped as a matter of law.

Due process of law is a summarized 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 a 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). 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).

Based upon the violations of Omar Loureiro's 5<sup>th</sup> and 14<sup>th</sup> Amendment rights under the United States Constitution and the violation of Article I, Section 9 of the Florida Constitution, the pending Indictment should be dismissed, or, alternatively, the State should be precluded from seeking the death penalty.

**V. JUDGE GARDINER AND ASA SHEINBERG ENGAGED IN IMPROPER EX PARTE COMMUNICATIONS CONCERNING THIS CASE DURING THE PENDENCY OF THE TRIAL AND SENTENCING PROCEEDINGS**

The Prosecutor and Judge have already admitted to engaging in behavior creating "an appearance of impropriety" causing reversal and remand for a new trial. In actuality, because of the egregious and offensive violations of the law, the Judicial Code and the Florida Bar Rules Regulating Conduct, this case is a blatant example of judicial and prosecutorial improprieties. Here, the *ex parte* contact was between the Judge and

the Prosecutor, during Omar Loureiro's prosecution. *Riechmann. State*, 966 S. 2d 298, 318 (Fla. 2007), *citing Rose v State*, 601 2.d 1181, 1183 (Fla. 1992).

Canon 3 B(7) of the Code of Judicial Conduct provides in pertinent part that "[a] judge shall not initiate, permit, or consider *ex parte* communications, or consider other communications made to the judge outside the presence of the parties concerning a pending or impending proceeding." The court has recognized that "there is nothing more dangerous and destructive of the impartiality of the judiciary than a one-sided communication between a judge and a single litigant." *Randolph v. State*, 853 So.2d 1051, 1057 (Fla. 2003) (quoting *Spencer v. State*, 615 So.2d 688, 691 (Fla. 1993)). Without question, an *ex parte* communication in a capital case in which the trial court delegates the job of evaluating sentencing factors and preparation of the sentencing order to the prosecution is improper and will require reversal. See, e.g., *State v. Riechmann*, 777 So. 2d 342, 351 (Fla. 2000). What occurred here is far worse.

Obviously, *ex parte* communication between a judge and a prosecutor is improper at any time. It is well settled that a judge shall not engage in any conversation about a pending case with only one of the parties participating in that conversation.

At bar, the nature of the contact was egregious. And, it is not as if the Judge or Prosecutor readily came forward to acknowledge their meeting and discussing the case while it was ongoing. They did not readily reveal their extensive telephone calls, their personal contact, or any of the details of their relationship.

"Assuming the worst," the Judge and Prosecutor, on a multitude of occasions, engaged in substantive discussions concerning the merits of the case. They discussed

the court's ruling allowing the gruesome photographs which caused one juror to faint, requiring emergency medical treatment. Who knows what other aspects of the case were discussed? At this juncture, we can only speculate.

While the Florida Supreme Court has not set forth a bright-line rule concerning *ex parte* communications, the contact and conduct at bar was clearly not concerning administrative matters. *Riechmann* at 318; *Rodriguez v. State*, 919 So. 2d 1252 1253 (Fla. 2005).

The facts of this case are far worse than "typical" *ex parte* communications when the Judge communicates with court appointed experts. Courts have held that, in general, the law frowns upon *ex parte* communications between judges and court-appointed experts. See *Bradley v. Milliken*, 620 F.2d 1143, 1158 (6th Cir. 1980) (expressing concern that reports of court-appointed experts were not placed in record or made available to parties); *United States v. Green*, 544 F.2d 138, 146 n. 16 (3d Cir. 1976) ("Generally . . . the court should avoid *ex parte* communications with anyone associated with the trial, even its own appointed expert."); see, generally, 29 Charles Alan Wright & Victor James Gold, *Federal Practice and Procedure* § 6305 (1997 & Supp. 2000) ("[E]*x parte* communications between the judge and the expert . . . are discouraged."). The reason is obvious: most *ex parte* contact between a trial judge and another participant in the proceedings risk harm, and *ex parte* communications with key witnesses (such as court-appointed experts) are no exception. To the contrary, such *ex parte* contacts can create situations pregnant with problematic possibilities. *United States v. Craven*, 239 F.3d 91 (1st Cir. 2001).

In *United State v. Dellinger*, 657 F.2d 1340 (7<sup>th</sup> Cir. 1981), the Defendant and Abbot (“Abbey”) Hoffman, William Kunsler, Esquire, and Jerry C. Rubin appealed their convictions which arose from their conduct in the 1969-70 “Chicago Seven” conspiracy trial. On appeal, the Defendants presented what the court termed “a unique claim for *coram nobis*.” *Id.* at 144. The Defendant’s alleged *ex parte* contact between judges, an assistant United States Attorney and members of the FBI. The appellate court stated:

“Although this novel theory is to our knowledge without precedent, we may assume without deciding that there might be circumstances so extreme that would deprive proceedings in a duly constituted federal court of their judicial character.”

*Id.* at 145

An exhaustive review of case law concerning the issues raised has been completed by the defense. Thus far, no identical factual circumstances are contained in any reported decision through Florida or the country. In all candor, the closest case, while easily distinguishable is a case from the Court of Appeals in Texas in *Abdygapparova v. State*, 243 S.W. 3d 191 (Tex.App. 2007). Although *Abdygapparova* dealt with a murder case, it was not a death penalty case<sup>6</sup>. The court reversed the Defendant’s conviction and life sentence and remanded for a new trial.

Unlike Omar Loureiro’s case, dismissal was not sought, although the case is supportive of the Defendant’s theories and grounds for dismissal or preclusion of the death penalty. In that case, the prosecutor and judge passed notes to each other

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<sup>6</sup> “Death is different”. *Kelly v. California*, \_\_\_ S.Ct. \_\_\_ (November 10, 2008), (Cases No: 07-11073 and 07-11425).

during voir dire. In the appellate opinion, the appellate tribunal addressed several issues concerning *inter alia*, *ex parte* communications and due process concerns.

With regards to the court's concerns surrounding the *ex parte* contact between the judge and the prosecutor<sup>7</sup>, the appellate court held

*Ex parte* communications "involve fewer than all of the parties who are legally entitled to be present." In re Thoma, 873 S.W.2d 477, 496 (Tex. Rev. Trib. 1994, no appeal) (citing Jeffrey M. Shaman, et al., Judicial Conduct And Ethics, § 6.01 at 145 (1990)).<sup>[fn17]</sup> Because of their inherent secretiveness, these communications are barred in an effort to ensure that all legally interested parties are given their "full right" to be heard under the law and to ensure equal treatment of all parties. *Id.* See *United States v. Arroyo-Angulo*, 580 F.2d 1137, 1145 (2d Cir.1978) (Closed proceedings "are fraught with the potential of abuse and, absent compelling necessity, must be avoided."). As the State acknowledges, the communications were between the prosecutor and the trial court and made with the expectation that the notes would remain private between the two of them. They, therefore, constitute *ex parte* communications.

The very tenets of our judicial system require the defendant to be present and a part of the public proceedings. "The spirit and genius of our Codes are opposed to any and every thing which militates against a fair, open and public trial. No step in the trial can be taken in the absence of the defendant. If allowed to be done or had secretly, his presence would be a mockery, — a very serious farce to defendant." *Conn v. State*, 11 Tex.App. 390, 1882 WL 9159, (Tex.Ct.App. 1882) (emphasis original). Based on these well grounded principles, our rules and case law strongly discourage *ex parte* communications, with very limited, extraordinary, emergency exceptions. See *Barnes v. Whittington*, 751 S.W.2d 493, 495 n. 1 (Tex. 1988). Thus, the Texas Code of Judicial Conduct specifically prohibits a judge from initiating, permitting or considering *ex parte* communication concerning the merits of a proceeding. Tex. Code Jud. Conduct, Canon 3(B)(8), reprinted in Tex. Gov't. Code Ann., tit. 2, subtit. G, app. B. (providing that a judge shall not permit or consider improper *ex parte* or other private communications regarding the merits of a pending or impending judicial proceeding).

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<sup>7</sup> The *ex parte* communications at bar are far more severe. Assuming the worst, there may have been a conspiracy to have Omar Loureiro executed and massive communications between the Judge and Prosecutor, at strange hours and for lengthy duration.

*Ex parte* communications are prohibited because they are inconsistent with the right of every litigant to be heard and with maintaining an impartial judiciary. When a judge takes the side of one party, whether expressly or implicitly, the court creates an additional opponent in the courtroom for the other litigant. See 48A Robert P. Schuwerk & Lillian B. Hardwick Texas Practice Handbook of Texas Lawyer and Judicial Ethics § 27.5 (2006-2007).[fn18] In *Tamminen*, we explained:

To avoid further erosions of confidence that our courts do, indeed, treat all litigants with equal fairness, judges and prosecutors alike must keep themselves, like Caesar's wife, above suspicion by scrupulously avoiding situations in which their fairness and integrity could appear to be compromised.

*Tamminen v. State*, 644 S.W.2d 209, 218 (Tex.App.-San Antonio 1982), *aff'd*, 653 S.W.2d 799 (Tex.Crim.App. 1983).

*Id.* at 207-208

Likewise, the Court addressed the due process of law concerns and stated:

Due process requires a neutral and detached hearing body or officer. *Gagnon v. Scarpelli* 411 U.S. 778, 786, 93 S.Ct. 1756, 36 L.Ed.2d 656 (1973). The Texas Constitution requires no less. *Brumit v. State*, 206 S.W.3d 639, 645 (Tex.Crim.App. 2006). We neither doubt nor downplay the trial court's right and need to manage the trial and the courtroom. *Silva v. State*, 635 S.W.2d 775, 778 (Tex.App.-Corpus Christi 1982, *pet. ref'd*). Unlike the communications reviewed by the presiding judge during the recusal proceeding, these *ex parte* communications were not simply "[expressions of impatience, dissatisfaction, annoyance, and even anger" toward Abdygapparova or her counsel. See *Liteky*, 510 U.S. at 555, 114 S.Ct. 1147. To the contrary, these comments were examples, *inter alia*, of the trial court providing guidance to the prosecutor on the presentation of his case and discussions regarding the trial court's initial ruling regarding Abdygapparova's ongoing request for an interpreter. As such, they extended beyond the realm of courtroom administration and etiquette, for which the trial court has control, and became strong evidence of bias and partiality.

*Id.* at 208

The Court stated:

Here, court held that the trial judge knew or should have known that engaging in written communications with the State regarding potential jurors, defense counsel's voir dire questions and presentation of argument, all in the presence of potential jurors, was improper. Tex. Code Jud. Conduct, Canon 3(B)(8), reprinted in Tex. Gov't. Code Ann., tit. 2, subtit. G, app. B. See *In re Davis*, 82 S.W.3d 140, 148 (Tex.Spec.Ct.Rev.2002) (holding that it is sufficient that the judge intended to engage in the conduct); *In re Barr*, 13 S.W.3d 525, 539 (Tex. Rev. Trib.1998, no appeal).

*Id.*

The court further acknowledged that it is the duty of all prosecutors, not to convict, "but to see that justice is done." Tamminen, 644 S.W.2d at 217. The court held:

"The secretive nature and content of the *ex parte* notes show a bias on the part of the trial court to favor the prosecution, even going so far as to make recommendations on the presentation of its case. As such, the trial judge became an advocate for the State, and an opponent of the defense, in direct conflict with her judicial requirement of absolute impartiality, precluding Abdygapparova from receiving a fair and impartial trial."

*Id.* at 209.

Finally, the court stated

This is an unfortunate case in which the trial judge failed to exercise appropriate caution and failed to maintain an attitude of impartiality throughout the trial. The trial judge's *ex parte* communications with the prosecutor suggest there was, at a minimum, a "chumminess" between the prosecutor and the trial court from which the jury could interpret that the trial court was "taking sides." Perhaps most alarming is the communication regarding Abdygapparova's ability to understand English which went to the heart of one of the trial court's rulings. *Ex parte* communications of this nature are evidence that the trial judge lacked the impartiality that due process requires.

*Id.* at 210

Based upon the foregoing grounds and authority dismissal of the Indictment or preclusion from a death sentence is mandated.

**VI. DISMISSAL IS WARRANTED UNDER THE COURT'S SUPERVISORY POWERS**

"Assuming the worst", that the Judge and Prosecutor conspired to have Omar Loureiro executed, this is clearly a case where the court's supervisory power warrant dismissed or preclusion of the death penalty.

Dismissal of the indictment under the court's supervisory powers for prosecutorial misconduct requires (1) flagrant misbehavior and (2) substantial prejudice. *United States v. Jacobs*, 855 F.2d 652, 655 (9th Cir. 1988). Negligence or gross negligence does not rise to flagrant misbehavior but "reckless disregard for the prosecution's constitutional obligations" may rise to flagrant misconduct. *United States v. Chapman*, 524 F.3d 1073, 1085 (9<sup>th</sup> Cir. 2007).

Based upon the misconduct at bar, dismissal is warranted. The Judge and Prosecutor engaged in flagrant misbehavior which caused substantial prejudice to Omar Loureiro. Already sentenced to death and held on death row for nearly two (2) years, Omar Loureiro is entitled to dismissal. Alternatively, the State should be precluded from seeking the death penalty.

**VII. THIS COURT SHOULD DISMISS THE INDICTMENT OR PRECLUDE IMPOSITION OF THE DEATH PENALTY TO DETER JUDICIAL, PROSECUTORIAL AND GOVERNMENTAL MISCONDUCT**

This Court, as a gatekeeper of appropriate conduct in court, should dismiss this case based upon judicial, prosecutorial and governmental misconduct. An Order of Dismissal would have a huge effect on the judicial, prosecutorial and public opinion of

“the system.” Unfortunately, the public perception of this case is that the true facts have been suppressed. In “the Sunshine State,” that should not be.

From the questions lodged to the defense from the Court, and the Order associated with this Motion, it is clear that the Court wants any authority to dismiss a case based upon any issues raised in this case. Basic tenants of the United States and Florida Constitutions set forth Omar Loureiro's rights to due process of law and to a fair trial. Additionally, every court in the land, from the United States Supreme Court down have ordered or upheld dismissal of criminal cases based upon outrageous and egregious conduct.

Flagrant misbehavior is clear in this case, although thus far, the State has only conceded “an appearance of impropriety.” The defense believes other egregious facts would be developed through discovery, but, “assuming the worst,” Omar Lourerio has meritorious grounds alleging that there was flagrant misbehavior by law enforcement, the State and the Judge. He has suffered prejudice in a multitude of respects.<sup>8</sup>

Obviously, defense counsel places no weight with anonymous allegations in the media or on blog sites. However, in the light most favorable to the defense, Sheila Alu's affidavit is presumed correct and is wholly inconsistent with the Judge and Prosecutor's sworn depositions. Dismissal should be ordered as a deterrent to this type of conduct. See, .e.g. *Arizona v. Evans*, 514 U.S. 1 (1993) [exclusionary rule as a deterrent of misconduct].

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<sup>8</sup> The Court has required the defense to show “what, if any, legal basis would support relief above and beyond a new trial in front of a new Judge from another circuit.” (9-30-09 Order at para. 1)

**CONCLUSION**

Based upon the foregoing arguments and authority, Omar Loureiro, who already served approximately 22 months on death row, seeks dismissal of the instant Indictment or preclusion from imposition of the death penalty

WHEREFORE, the Defendant respectfully requests that this Court dismiss the indictment against him and/or preclude the State of Florida from seeking the Death penalty in this matter and for such further relief as this Court deems just and proper.

RESPECTFULLY SUBMITTED,

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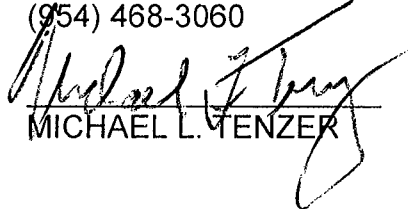
  
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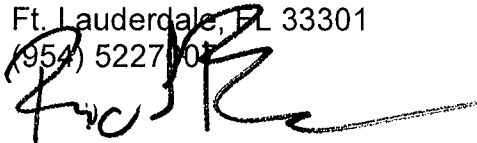
WE HEREBY CERTIFY that a copy of the foregoing was furnished via hand delivery to 1) The Honorable Lucy Chernow Brown, Circuit Judge, 205 N. Dixie Hwy., Rm. 10.2215, West Palm Bch., FL 33401; 2) the Office of the State Attorney, 201 SE 6th Street, 6th Flr., Ft. Lauderdale, FL 33301, Attn: ASA J. Scott Raft, Esq., ASA Brian Cavanaugh, Esq., and 3) Clerk of Court, Circuit Felony Division, Broward County Courthouse, 201 SE 6th Street, Ft. Lauderdale, FL on this **19th day of October, 2009.**

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