IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Petitioner,

vs. CASE NO. 63,346

DALE WHEELER,

Respondent.

FILED

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SID J. WHITE
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ANSWER BRIEF OF RESPONDENT

ON APPLICATION FOR DISCRETIONAY REVIEW
FROM THE DISTRICT COURT OF APPEAL, FIRST
DISTRICT OF FLORIDA

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INTRODUCTION

Petitioner, the State of Florida, was the Appellee in the District Court of Appeal, First District of Florida. Throughout this brief, the State of Florida shall be referred to as the Petitioner or the State.

Respondent, Dale Wheeler, was the Appellant in the District Court of Appeal, First District of Florida. Throughout this brief, Mr. Wheeler shall be referred to as the Respondent or Mr. Wheeler.

All reference to the transcript of the trial held on September 15, 1981, shall be designated (T-_), followed by the appropriate page number, and occasionally, line number.

STATEMENT OF THE CASE AND FACTS

The Respondent supplements THE PETITIONER'S STATEMENT OF THE CASE AND FACTS with the following.

The Respondent relied on the defense of entrapment as to all the Counts alleged against him.

James D. Brown was an undercover agent or paid informant working for the Okaloosa County Sheriff's Department at all times relevant to this case. (T-94).

The Respondent first met Agent Brown approximately one and one-half years prior to the trial. (T-132).

Respondent said that Brown came to his house around April 5th or 6th of 1981 and indicated that he was looking for a source of drugs to supply his dealers. Respondent stated that he informed Brown that he did not get involved in that type of matter. (T-132, 133).

Respondent testified that Mr. Brown repeatedly returned to his home and urged him to furnish him with a supply of drugs, but that he repeatedly told Brown that he did not want to get involved. In this regard, the following testimony is pertinent:

> He left and the next day he came back again and told me he had been looking everywhere and he couldn't find nothing nowhere. He said you have to help me. I've got to get some stuff up to supply my people with. I said I don't know where anything is, like I told you before, and I don't want to mess with it. He told me he would pay me $500.00 a week salary if I would just find the drugs for him. I

told him - I said I don't want to get involved in no mess like that. I said because I just didn't want to be involved in it.

About two days later he and his wife came by the house. She didn't get out of the car. She just sat in the car and he come up there again telling me he wanted me to see if I could find some marijuana and stuff for him. I told him - I said like I told you before, I don't mess with it. I said I got arrested here a few weeks ago for having a pistol in my car and I said I just got through talking to a lawyer today. I said he told me he would charge me $1,500.00 to take the case. I said I have got to try to get that up some where or another. I said I don't want to mess with that because I'm in trouble and I don't want to get into any trouble. He said if you will find me some drugs I will give you the money for the lawyer - I'll give you $1,500.00 for the lawyer. So I told him, I said well like I said, I don't want to mess with it.. So then he --

Q This was the third time:

A Yes.

Q Were all of these conversations at your home or inside your home or in your yard?

A Right. So the next time he came back, he came back with Chuck Stacy and I told him then, I said I don't know where anything is like I told you before. So he said we will take care of you, you don't have to worry about nothing. He said if you get in any trouble I'll bond you out and everything; you ain't gotta worry about nothing. He said we have got a big operation and plenty of money and everything like that. So I told him I would look around.

Q At this point, were you dealing drugs?

A No, I ain't never dealt drugs.

Q Did you have any in the house?

A No sir, I didn't have anything. So the next time he and Chuck Stacy come back there and I had seen this person that said they had four pounds and they said they wanted $700.00 a pound for it. So I told Chuck and Jim - I said a person told me they had four pounds they wanted $700.00 a pound for. They told me they would be

back tomorrow to get it. I said O.K. (T-133, L-6 through 135, L-2).

The Undercover Agent James Brown admitted that between April 6, when he first went to Respondent's residence, and April 14, 1981, when he and Undercover Agent Stacy went to Respondent's residence, he could have had as many as three or four intervening visits with Respondent at his home. (T-89 through 91). He could not remember the exact number of times that he had talked to Respondent. (T-91).

Brown admitted that Respondent had neither come to his residence nor called him in regard to the drug transactions, and that on each occasion he had gone to the home of Respondent. (T-91).

Moreover, Agent Brown indicated that he had never previously purchased any drugs from Respondent nor had he seen Respondent in possession of any drugs. (T-90).

Brown indicated that he was unemployed on April 1, 1981, and that he had approached the Sheriff's office to inform them that he had information that Respondent was dealing in drugs. (T-86, 87).

Brown was paid expenses for his operation as a confidential informer in amounts ranging from $100.00 to $200.00. (T-94).

Brown admitted that he had previously been convicted of a felony. (T-95).

Narcotic Investigator Sam Brewer indicated that he had first acquired any information regarding Respondent's possible

involvement in drugs "around the 1st of April". (T-106, 119).

Respondent testified that the money paid for the contraband was not his. (T-158). That Respondent was not going to obtain any of the money paid for consideration for the contraband is corroborated and supported by the contents of the surveillance tapes which indicate that the individuals which Respondent had contacted for the under-cover agents were the ones who were to receive the money. (T-176, LL. 1 through 3, LL. 7 through 12).

Petitioner's inference that the Respondent contradicted himself in regard to his personal use of marijuana is un-founded. (PETITIONER'S BRIEF ON THE MERITS-5). Respondent's testimony indicates that he was speaking of selling or dealing in drugs, not with personal use of them, when he indicated that he never "messed" with them. (T-148, 149).

Regarding Respondent's defense of entrapment, all of the State's evidence contradicting Respondent's testimony rested entirely on the credibility of Informant Brown.

When Respondent's trial counsel was presenting his final argument regarding entrapment to the jury, the following occurred:

> The State has to prove beyond a reasonable doubt that the defendant was not entrapped. That is a heavy burden. Did the State prove that Dale was not entrapped? You think about that. That was their job. Did they carry their burden?
>
> MR. GRINSTED: Your Honor, I am going to

have to object at this time. I think that will be a misstatement of the law as the jury instructions give it.

JUDGE: The Court is going to sustain the objection. I don't think, Mr. Lindsay, that there is a statement in my proposed charge on entrapment requiring the State to prove that the defendant was not entrapped.

MR. LINDSAY: Your Honor, that comes from the fact that the State has to prove their case beyond a reasonable doubt.

JUDGE: Yes sir, but they don't have to disprove an affirmative defense. (T-198, L. 22 through 199, L. 11).

* * *

(JUDGE:) Hold on just a minute, Mr. Lindsay, if you will. I hate to interrupt your closing argument, but the Court's proposed charges does not include any instruction to the effect that the State is required to prove that the defendant was not entrapped. (T-199, LL. 19 through 23).

All of the immediately preceding dialogue between the court, the prosecutor and defense counsel occurred before the jury.

The prosecutor's final argument created the following scenario:

(Mr. Grinsted:) Mr. Wheeler indicates he was unreasonably lured by payments for attorney fees. He said he turned all the money over to the people who had the dope. He didn't get any. Does it sound reasonable that someone would sell or deliver these drugs and not receive anything for his trouble? He did it out of the goodness of his heart? I guarantee you that Mr. Wheeler made quite a bit of money. He would have made quite a bit of money off of this transaction if it had gone as he planned.

Ladies and gentlemen, these people are playing with over $20,000.00 worth of drugs. This is no small time operation. But I want you to remember, Mr. Wheeler says "I have never messed with drugs".

The Judge is also going to tell you that it is not entrapment merely because law enforcement officers in good faith attempted to detect crime by supplying the means and opportunity to commit.

> Ladies and gentlemen, these officers were acting nothing but good faith. They know there are drugs out there. It's all over the place. It's in the school yard, it's in the playground, it's in the homes - it doesn't matter whether you are rich or poor, the drugs are out there. These officers know there is only one way to stop it and that is to go after the dealer. Ladies and gentlemen, Mr. Dale Wheeler is one of these people. He is one of these dealers. He is supplying the drugs that eventually get to the school yards and eventually get to the school grounds and eventually get into your own homes. He is one of the people who is supplying this. For him and people just like him --
>
> MR. LINDSAY: Your Honor, if if please the Court, I hate to interrupt another lawyer when he is arguing a case and I hate to be interrupted, but he has commented on things not in evidence and I specifically request that the jury be admonished to disregard those comments about Mr. Wheeler being a dealer because there is no evidence of that. And the comments he went on with about where these drugs wind up and, for the record, I also move for a mistrial.
>
> MR. GRINSTED: Judge, I am sitting here with over 50 pounds of dope he is charged with --
>
> JUDGE: I am going to deny the motion for mistrial. I am going to also overrule the objection; however, I will remind Mr. Grinsted that the defendant in this case is charged with this particular crime.
>
> MR. GRINSTED: Yes sir. Ladies and gentlemen, we are not talking about just a little bit of dope here. We are not talking about a little bag. We are not talking about selling a little bit of dope to your buddy or to your friend. That is not what we are talking about. We are talking about big business - a lot of profit - big money. We are talking about major crime. (T-188, L. 12 through 190, L. 12).

Shortly before the above-quoted argument, objection and ruling, the prosecutor had indicated that there were not 25 people in Okaloosa County who could acquire the amount of drugs that were involved in this case. (T-188, LL. 2,3).

It should be specifically noted that the Respondent's trial counsel not only objected to the Prosecutor's comment on things not in evidence and the accusation that Respondent was a dealer, but also objected to the Prosecutor's comments regarding "where these drugs wind up....". (T-189). The objection, therefore, is clearly directed at the accusation of the Prosecutor that Respondent's "dealing" in drugs causes them to get to the school yard, the school grounds, and into the jurors' own homes.

ARGUMENT

POINT I

THIS COURT SHOULD DISMISS THIS CERTIORARI PROCEEDING SINCE AN ANSWER TO THE QUESTION CERTIFIED BY THE DISTRICT COURT OF APPEAL WOULD NOT BE DETERMINATIVE OF THE CASE AND WOULD BE A MERE ADVISORY OPINION.

The issue of whether this Court should determine on certiorari a case which is before it due to certification that a question is of great public importance and when the answer to such certified question is not determinative of the case appears to be a matter of first impression in this State. It is respectfully submitted that this case brings that issue squarely before the Court.

The question certified by the court below is as follows:

> When the defendant in a criminal case raises the defense of entrapment, where does the burden of proof lie? Wheeler v. State, 425 So. 2d 109 (Fla. 1st DCA 1983), at 112.

However, the District Court's reversal was based on the trial court's statement which

> misled the jury to believe the state has no burden of proof in relation to an entrapment defense. Id. at 111 (emphasis supplied).

In this regard, the trial court's statement quoted in the opinion by the District Court of Appeal is as follows:

> The Court is going to sustain the objection. I don't think, Mr. Lindsay, that there is a

> statement in my proposed charge on entrapment requiring the state to prove that the defendant was not entrapped.
>
> * * *
>
> Yes, sir, but they don't have to disprove an affirmative defense. Id. at 111.

Although not quoted in its opinion, the court below had considered the following additional statement of the trial court:

> Hold on just a minute, Mr. Lindsay, if you will. I hate to interrupt your closing argument, but the Court's proposed charges does not include any instruction to the effect that the State is required to prove that the Defendant was not entrapped. (T-199, LL. 19-23).

As was apparent to the District Court below, these trial court rulings made in the presence of the jury misled it into believing that the state was required to prove nothing in regard to entrapment although Respondent had established prima facie evidence of same.

In short, the reversible error found by the District Court lies in the trial court's indication before the jury that the State had no burden of proof in regard to entrapment. The above-quoted statement indicated to the jury that -- even though the Respondent had adduced sufficient evidence of entrapment to warrant jury instruction on said defense -- the State was required to present nothing to contravene such evidence. To the jury, the judge's ruling would not mean merely that the State

was not required to disprove entrapment beyond a reasonable doubt, but it would also mean that the State was not required to disprove such a defense by even a preponderance of the evidence, nor even by presenting a scintilla of evidence to contravene the Respondent's evidence of entrapment.

The Petitioner relies heavily on the United States Supreme Court case of Patterson v. New York, 432 U.S. 197, 53 L. Ed.2d 281, 97 S. Ct. 2319 (1977). However, that case held only that a state may require a defendant to prove the affirmative defense of extreme emotional disturbance by a preponderance of the evidence. The established law of New York at the time of Patterson's trial clearly required the defendant to prove such an affirmative defense by a preponderance of the evidence.

Here, however, at the time of Respondent's trial, the established Florida law regarding the defense of entrapment required the State to prove the absence of entrapment beyond a reasonable doubt after a defendant had established sufficient evidence of entrapment. See, for example, Moody v. State, 359 So.2d 557 (Fla. 4th DCA 1978).

Petitioner seems to argue that the rewriting of former Florida Standard Jury Instruction (criminal) 2.11(e) changed the law of Florida regarding the State's burden of proof in entrapment cases. The Petitioner's argument necessarily rests on the proposition that the change in the jury instruction not only eliminated the State's burden of proving the absence of entrapment beyond a reasonable doubt, but that it

also removed the State's burden of negating entrapment by even a preponderance of the evidence.

However, the new jury instruction regarding entrapment indicates no such drastic ramifications:

> If you find from the evidence that the defendant was entrapped, or if the evidence raises a reasonable doubt about the defendant's guilt, you should find him not guilty. Florida Standard Jury Instruction (criminal) 3.04(c).

Moreover, the sustaining of Petitioner's argument would also require a determination that the change in the jury instruction imposed a burden of proof on the defendant. However, Petitioner does not make clear what it believes the defendant's burden should be. In other words, the Petitioner does not state whether it believes the defendant has a burden of (1) raising a reasonable doubt regarding entrapment, (2) establishing entrapment by a preponderance of the evidence, or (3) establishing entrapment beyond a reasonable doubt.

It is respectfully suggested that the Petitioner fails to present its position in this regard because it is not reasonable to argue that the change in the jury instruction can be constitutionally construed to drastically change the law of Florida so as to impose the burden of proof on a defendant when such burden had previously been firmly on the shoulders of the State.

Thus, whatever burden of proof the State of Florida determines to impose on a defendant who raises the defense of entrapment in the future, it is clear that the burden of proof was not on the defendant at the time of Respondent's trial below.

For these reasons, to impose such a burden on the Respondent and to eliminate the State's burden of proof regarding entrapment would violate Respondent's right to due process of law and a fair trial as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and by Article I, Sections 9 and 16 of the Florida Constitution. Moreover, for the Court to impose such a burden of proof on the Respondent would constitute an impermissible ex post facto application of the law in violation of Respondent's rights under Art. I, Sec. 10 of the United States Constitution and Art. I, Sec. 10 of the Constitution of the State of Florida.

In short, the ruling of the trial judge on the prosecutor's objection and his statement before the jury made it clear to Respondent's jury that the judge had determined that the State had absolutely no burden of proof in regard to the issue of entrapment. Such a rule of law can not be constitutionally applied to the Respondent in this case, and the court's ruling and statement was, in fact, contradictory to the established rule of Florida law. Indeed, it contradicts the implicit intent of the revised Florida Standard Jury Instruction (criminal) 3.04(c) quoted above. Due to

the said misleading statement of the trial court, the jury was caused to reach the improper legal conclusion. See, Blitch v. State, ____So.2d____(Fla.2d DCA, Case No. 81-2443, March 2, 1983).

Thus, since the court below has determined that the trial court misled the jury to believe that no burden of proof was imposed on the State, and since no such rule of law can be constitutionally applied to Respondent, an answer to the certified question is unnecessary for the determination of this case. Such an answer would be merely advisory for future cases.

It is respectfully submitted that the rendering of such an advisory opinion would not well serve the jurisprudence of this state, and that this Court should therefore exercise its discretion by declining review of the issues posed by Petitioner. Precedence for such refusal to review questions nondeterminative of a case is found in cases under former Rule 4.6, Florida Appellate Rules (1962 Revision) and in cases before this Court on certification that a question is of great public interest. In re Taylor, 166 So.2d 476(Fla.2d DCA 1964); Moeller v. Doe, 309 So.2d 611(Fla. 1st DCA 1975); and State v. Burgess, 326 So.2d 441(Fla. 1976). The policy underlying these cases is equally applicable in the case at bar.

POINT II

THE PETITIONER HAS STATED AN INAPPROPRIATE ISSUE UNDER ITS POINT I. THE TRIAL COURT'S ERROR WAS COMMITTED BY ITS ERRONEOUS INTERPRETATION OF THE JURY INSTRUCTIONS AFTER THE PROSECUTOR'S OBJECTION TO THE RESPONDENT'S FINAL ARGUMENT, NOT DURING THE READING OF THE STANDARD JURY INSTRUCTION.

For the reasons stated under Point I of Respondent's argument above, it is submitted that the language of Florida Standard Jury Instructions (criminal) 3.04(c) does not eliminate the State's burden of proof in regard to the entrapment defense. Respondent's trial counsel made this position clear in the following dialogue in the presence of the jury:

> JUDGE: The Court is going to sustain the objection. I don't think, Mr. Lindsay, that there is a statement in my proposed charge on entrapment requiring the State to prove that the defendant was not entrapped.
>
> MR. LINDSAY: Your, Honor, that comes from the fact that the State has to prove their case beyond a reasonable doubt.
>
> JUDGE: Yes sir, but they don't have to disprove an affirmative defense. (T-109, L. 22 through 199, L. 11).

Thus, trial counsel's position that the law and the jury instructions required the State to prove the absence of entrapment beyond a reasonable doubt was clearly refuted by the trial court.

Therefore, under the circumstances of this case, that there was no objection to the Standard Jury Instructions and

no request for special instructions is of no consequence. Florida Standard Jury Instruction (criminal) 3.04(c) fully comports with the rule set forth in Moody v. State, 359 So.2d 557(Fla. 4th DCA 1978) and, indeed, with all the previously established Florida law regarding the burden of proof in entrapment cases. As stated by the District Court, no significance should be attached to the change in the Standard Jury Instructions since the intent of the alteration from Florida Standard Jury Instruction (criminal) 2.11(e) to Florida Standard Jury Instruction (criminal) 3.04(c) was not to change the law "but was to merely avoid undue emphasis as to the state's burden of proof". Wheeler v. State, 425 So.2d 109(Fla. 1st DCA 1983), at 111.

Hence, it was not the wording of the instructions, but the trial court's inappropriate and erroneous interpretation of same, which misled and confused the jury thereby denying Respondent his right to due process of law and fair trial.

The Petitioner also relates that the trial court instructed the jury that "the defendant is not required to prove anything". (T-113; PETITIONER'S BRIEF ON THE MERITS-9). It is respectfully submitted that this has no significance as to the particular issue before the Court. The issue presented here relates to the State's burden of proof, not to whether a Defendant is required to present any evidence to avoid conviction.

The basis for the decision below was that the trial court misled the jury into believing that the State had no burden of disproving an entrapment defense after the Respondent had adduced evidence of entrapment sufficient to require jury instructions on same. The District Court's decision, therefore, was not premised on any erroneous comment or instruction requiring the Respondent to present evidence in his defense.

In short, the instruction that the Respondent was not required to offer any proof did nothing to overcome the ruling and statement of the trial court that the State had no burden of proof - indeed, no burden of offering proof - regarding entrapment even after the Respondent had presented evidence of entrapment sufficient to require jury instructions regarding the issue.

In its criticism of the decision of the court below, Petitioner made the following statement:

> . . . the court accepted Respondent's counsel's argument that the reason for the omission in the new instructions was that the State's burden of proof should not be emphasized. This distinction makes no sense - what the First District has done has been to determine that the State's burden of proof should not be emphasized yet this is precisely what the First District has done by reversing based upon law that does not exist. (PETITIONER'S BRIEF ON THE MERITS-10).

This argument of Petitioner ignores the following: (1) The decision of the District Court below did not require the emphasis on the State's burden of proof as illustrated by the former jury instruction, it merely

determined that the State's burden had not been destroyed by the new instruction; and (2) Petitioner blames the court for "reversing based upon law which does not exist" and simultaneously propounds that the conviction should be affirmed on a principle of law that did not exist in Florida at the time of Respondent's trial, i.e. that the State has no burden of proof regarding entrapment after a defendant has presented sufficient evidence of same.

As has been pointed out under Point I above, Petitioner, without explicitly doing so, appears to argue that the burden of proof in regard to entrapment should be on the defendant. In this regard, Petitioner has relied on the United States Supreme Court case of Patterson v. New York, 432 U.S. 197, 53 L. Ed.2d 281, 97 S.Ct. 2319(1977).

As was pointed out under Point I above, Petitioner's reliance on the said case is misplaced since Patterson held only that a state may require a defendant to prove certain affirmative defenses by a preponderance of the evidence. New York had established such a burden on the defendant at the time of Patterson's trial. That, of course, is not the situation in the case at bar.

Partially as a result of its misplaced reliance on Patterson, id., Petitioner criticizes the District Court's approval of the law as stated in Moody v. State, 359 So.2d 557(Fla. 4th DCA 1978). Moreover, Petitioner criticizes the logic of the principles set forth in Moody by stating that the rule set forth in that case is inconsistent on its face. (PETITIONER'S BRIEF ON THE MERITS-10).

Petitioner is mistaken. Its mistake rests on its assumption that the rule requires the court to instruct a jury that the defendant has the burden of introducing evidence of entrapment. However, the rule requires no such instruction. The rule requires only that the trial court first determine that there has been sufficient evidence of entrapment before instructing the jury that the State has the burden of disproving entrapment beyond a reasonable doubt.

The Petitioner also relies on the case of State v. Kahler, 232 So.2d 166(Fla. 1970) in its assertion that the State should not have the burden of disproving entrapment after sufficient evidence of entrapment has been raised by a Defendant. However, that case does not support its position.

The holding in State v. Kahler, id., is merely that a statute may place on a defendant the burden of going forward with the evidence in order to rebute an evidentiary presumption. Id. at 168. The case determined only that the State is not required to anticipate all defensive matters and exceptions to criminal statutes prior to such defensive matters and exceptions being raised by a defendant. In a word, the case lends no support to Petitioner's argument.

Although it is not essential for the determination of this case and the approval of the decision below, as explained

under Point I above, it is respectfully submitted that the rule stated in Moody v. State, 359 So.2d 557(Fla. 4th DCA 1978) and approved in the District Court below is the existing law in Florida and should remain so.

A great many drug cases originate due to the solicitations of unofficial and unsupervised informants and agents who have criminal backgrounds and are working for law enforcement only to curry favor or avoid prosecution. Indeed, the agent in this case was unsupervised and unaccompanied by official law enforcement when he first went to the Respondent's home on three or four occasions to solicit Respondent's participation in illegal activities. (T-89-91). He was also a convicted felon. (T-95).

Moreover, the evidence of the absence of entrapment often rests, as it did here, entirely on the credibility of such an agent. Thus, the elimination of the State's burden of disproving entrapment after defendants have established a prima facie case of entrapment would lead to convictions in cases where the credibility of the State's evidence on the entrapment issue is weak or non-existent.

The rule approved below has and must continue to safeguard against such miscarriages of justice. That rule has not and will not impose an undue burden on law enforcement.

In summary, the District Court appropriately found reversible error in the trial court's statement before the

jury that the State has no burden of proof in regard to entrapment. That statement misled the jury to believe that - even though the Respondent had adduced sufficient evidence of entrapment to warrant jury instructions on same - the State was required to present nothing to contravene such evidence. To the jury, the Court's ruling and statement indicated not only that the State was not required to disprove entrapment beyond a reasonable doubt, but that the State was not required to disprove such a defense by even a preponderance of the evidence, nor even by presenting a scintilla of evidence to contravene the Defendant's evidence of entrapment. Such was clearly not the law of Florida. Respondent was therefore deprived of his right to due process of law and a fair trial.

Finally, and although it is not a requisite for the affirmance of the decision below, the rule expressed in Moody, id., should remain the law of this State in order to safeguard against the dangers explained above.

POINT III

THIS COURT SHOULD DECLINE DISCRETIONARY REVIEW OF THE DISTRICT COURT'S DETERMINATION THAT REVERSIBLE ERROR WAS COMMITTED BY THE TRIAL COURT IN OVERRULING DEFENSE COUNSEL'S OBJECTION TO THE PROSECUTING ATTORNEY'S CLOSING ARGUMENT AND IN FAILING TO GRANT DEFENSE COUNSEL'S MOTION FOR MISTRIAL.

The prosecutorial argument and the objections to same which were subjected to review by the District Court below are set forth in the Statement of Case and Facts above.

It is respectfully submitted that the District Court's determination that the trial court committed reversible error by overruling defense counsel's objection to the prosecutor's argument and by failing to grant a mistrial should not be reviewed by this Court. Firstly, the issue involves merely an ad hoc application of law to a particular set of facts and does not lend itself to the establishment of a precedent helpful for the bar or the judiciary of the state. Secondly, the determination of the issue by the District Court should be final and that court should be allowed to determine the limits of prosecutorial advocacy within its jurisdiction.

The discretionary power of this Court to decline the review of issues ancillary to the issue on which this Court's jurisdiction is based is amply supported by precedent. Sanchez v. Wimpey, 409 So.2d 20(Fla. 1982); International Patrol And Detective Agency Co., Inc. v. The Aetna Casualty and Surety Co., 419 So.2d 323(Fla. 1982)(concurring opinion

of C.J. Alderman).

Petitioner has shown no direct conflict between the District Court's holding on this issue and any decision of this Court or another district court of appeal. Therefore, in accordance with the discretion exercised in Sanchez v. Wimpey, id., consideration of the merits of this issue should be declined.

The writings of former Justice Arthur J. England, Jr., support Respondent's position that this Court should here decline review:

> The supreme court should now decline to review any district court decision which the court deems to lack importance to the jurisprudence of the state, even though a conflict of decisions or one of the other enumerated criteria for review exists. Opinions should embrace only the legal issue which was important enough to persuade the Justices to accept the case for review. "Constitutional jurisdiction of the Supreme Court of Florida: 1980 Reform", Univ. Fla. L. Rev., Vol. 32, No. 2, Winter 1980, at page 182.

For these reasons, it is respectfully submitted that the prosecutorial comment issue presented in this case is not of the type warranting discretionary review by this Court. The decision of the District Court below should be deemed final.

POINT IV

THE DISTRICT COURT'S DECISION THAT REVERSIBLE ERROR WAS COMMITTED BY THE TRIAL COURT'S OVERRULING OF DEFENSE COUNSEL'S OBJECTION TO THE PROSECUTOR'S CLOSING ARGUMENT AND ITS REFUSING TO GRANT THE MOTION FOR MISTRIAL WAS CORRECT.

The comments of the prosecutor have been set forth in the Statement Of The Case And Facts above.

Initially it should be noted that Petitioner states that the sole grounds for the defense counsel's objection to the prosecutor's argument was that there were comments about matters which were not in evidence. (PETITIONER'S BRIEF ON THE MERITS-13). However, the objection of defense counsel, as set forth in Petitioner's brief, makes it clear that the said objection was also based on the prosecutor's inflammatory assertion that the Respondent was one of the dealers who provided the drugs that went to the children on the school playgrounds and into the jurors' own homes. (T-189).

In this regard, it should be noted that the objection of defense counsel, although absolutely clear from the context, did not again refer to the schoolyards or the jurors' own homes but referred to the prosecutor's comments "about where those drugs wind up...". (T-189). By using such terminology, the defense counsel was only wisely avoiding reiteration of the inflammatory comments before the jury. His method of wording was intended to state the obvious grounds of the

objection without further prejudice to his client.

The Petitioner has chosen not to discuss the effect on the jurors of such inflammatory comments or the District Court's determination that the reference to the jurors' homes was in the nature of a "golden rule" argument. Rather, Petitioner discusses only the issue of whether the State had established that Respondent was one of the dealers to which the prosecutor referred.

In this regard, the Petitioner argues that the Respondent's admission of the acts which technically constituted the offenses with which he was charged was evidence that the Respondent was a "dealer". (PETITIONER'S BRIEF ON THE MERITS-13).

Petitioner's argument ignores the common understanding of the meaning of the term "dealer". Such term connotes an established and ongoing involvement in the sale and distribution of drugs. However,there was absolutely no evidence presented in the case below indicating that the Respondent had been involved in such previous drug enterprise.

Moreover, Petitioner's brief would cause one to believe that the sole basis for the reversal was the use of the term "dealer". Obviously, the context of the prosecutor's argument entailed much more than that when he stated that the Respondent was a dealer who was "supplying the drugs that eventually get to the schoolyard and eventually get to the school grounds and eventually get into your own homes". (T-189). (Emphasis supplied).

Further, in Petitioner's argument that considerable latitude should be allowed the prosecutor in regard to arguments on the merits of the case, Spencer v. State, 133 So.2d 729(Fla.1961) is cited. But in the same paragraph quoted by the Petitioner, Id. at 731, is found the following:

> Their [prosecutors'] discussion of the evidence, so long as they remain within the limits of the record, is not to be condemned.... (Emphasis supplied).

In the case at bar, no stretch of the imagination will reveal any evidence regarding drugs going to the school yards, the playgrounds, or into the jurors' homes.

In a word, the prosecutor's accusation that Respondent was one of the dealers who was supplying drugs that reached the "school yards", "the playground", and which "eventually get into your own homes" was unsupported by any evidence before the jury, and was intended to arouse the extreme fears of the jurors for the welfare of school children and, indeed, their own children. His argument deprived Respondent of his basic rights to due process of law and to a fair trial as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and by Article I, Sections 9 and 16 of the Florida Constitution.

This type of comment could not have been cured even if the trial court has sustained counsel's objection and instructed the jury to disregard it. That sustaining the objection

and attempting to cure the prosecutor's misconduct by corrective instructions is not adequate to protect the rights of a defendant confronting such inflammatory and prejudicial comments has been previously determined in Reed v. State 333 So.2d 524(Fla.1st DCA 1976), at 526. The prejudicial prosecutorial comments related in Reed v. State, id. at 525, are strikingly similar to the argument presented by the prosecutor in this case.

However, the case at bar presents an even more prejudicial situation than that in the Reed case because here the trial court overruled the defense counsel's objection to the inflammatory comment and very likely caused the jury to believe that it was appropriate to consider same.

Moreover, the prosecutor in this case utilized a variation of the universally condemned "Golden Rule" argument when he instilled in the jurors' minds the fear that the drugs which the Respondent was allegedly supplying would "eventually get into your (the jurors') own homes". (T-189). This attempt to arouse the juror's anger and inject an element of fear for the children in their own homes causes the prosecutorial argument here to be much more prejudicial than the condemned argument found in the above-discussed Reed case. Again, the trial court below overruled the objection to the argument,

unlike the trial court in Reed, and such overruling compounded the prejudice to the Respondent.

Further, the argument of the prosecutor that the law enforcemnt officers were "acting in nothing but good faith" and who "know there is only one way to stop it (the drug trade) and that is to go after the dealer" (T-189) was intended to convey to the jurors that the drug traffic in the school yards, playgrounds and ultimately their own homes would continue if they did not convict the Defendant. Shortly before his comment about going after the dealer, the prosecutor had conjectured without support from any evidence before the jury that the defendant was one of less than 25 people in the county who could "come up with that much drugs". (T-188).

A prosecutorial argument creating a fear that crime will continue if the defendant is acquitted has been deemed reversible error even when objections to such arguments are sustained and curative instructions are given. McMillian v. State, 409 So.2d 197(Fla.3d DCA 1982); Sims v. State, 371 So.2d 211(Fla.3d DCA 1979); and Porter v. State, 347 So.2d 449(Fla.3d DCA 1977). The overruling of the objection to the prosecutor's argument in the instant case and, as stated, the injection of fear in the minds of the jurors for the safety of those living in their homes greatly augmented the damage to Respondent's rights and made reversal even more compelling than in the cited cases.

Additionally, the argument of the prosecutor was intended to convey to the jury that the Respondent was in an ongoing drug trade which posed a grave danger to the community and to the jurors' homes. (T-188, 189). He specifically stated that Mr. Wheeler was one of those "dealers" whom the law enforcement officers were after and who were supplying the drugs to the schools and homes. (T-189). This prejudicial argument was without evidentiary support and went far beyond the scope of the issues being tried.

Such unsupported implications have been condemned and deemed reversible error. See, for example, Glassman v. State, 377 So.2d 208(Fla.3d DCA 1979) where the prosecutor in closing argument implied that the physician on trial for insurance fraud was involved in a "mill" for insurance fraud. That court stated:

> . . . no such defendant can get a fair trial when the state's representative in the courtroom, based on no evidence, accuses the defendant before the jury of the crimes for which he is not on trial. The jury is bound to be inflamed against the defendant, placing its trust as it should on the word of the state's officer in the courtroom. The jury is bound to conclude that there is other evidence of which the prosecutor is aware which shows that the defendant is guilty of other crimes. As such, the ensuing verdict is bound to rest on highly incriminating alleged "facts" which are not a part of the record and, accordingly, such a verdict cannot stand. Id. at 211.

Here, the prosecutor's unsupported accusation that Respondent was "one of these dealers" who was "supplying the drugs that eventually get to the school yards . . . and

into your homes" (T-189) was probably even more prejudicial than the comments of the prosecutor in Glassman.

The appropriate rule governing cases of this nature has been stated in McMillian v. State, 409 So.2d 197(Fla. 3d DCA 1982) and Chapman v. California, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705(1967).

> If upon objection and timely motion for mistrial, an appellate court is not satisfied beyond a reasonable doubt that the error did not contribute to the conviction, reversal is appropriate. McMillian v. State, supra at 198. (Emphasis supplied).

The facts of this case only establish a reasonable doubt that the prosecutor's closing argument did not contribute to the conviction but in fact establish a strong probability that the argument did contribute to the conviction.

The Respondent's defense of entrapment was a close question for jury determination, and such determination was governed primarily, and possibly solely by the jury's view of Respondent's credibility vis-a-vis the credibility of James Brown, the government's paid informant and undercover agent. It is therefore respectfully submitted that it would be the height of folly to deny that the prosecutor's inflammatory and prejudicial argument did not contribute to the conviction.

The cases cited by Petitioner in support of its argument that the District Court's reversal should be quashed are not persuasive.

Breedlove v. State, 413 So.2d 1(Fla. 1982), is not on point. All of the statements of the Breedlove prosecutor

raised as error on appeal related specifically to evidence that had in fact been presented to the jury.

Moreover, this Court observed that the prosecutor had not referred to Breedlove as an "animal" as had been claimed by his attorney. And, after this Court had noted all the other facts in evidence concerning which the prosecutor had commented, it affirmed the conviction.

Importantly, the evidence in the Breedlove case clearly established that the crime had in fact been committed in the victim's home, and this Court agreed with the trial judge's determination that the argument was not prejudicial "due to the context in which the objected-to remarks were made." Id. at 8.

The circumstances in the case at bar are entirely different. The District Court below determined that the prosecutor's comments had absolutely no support in the record but could have led the jury to believe that the prosecutor had information outside the record which showed that the drugs sold by the Respondent were destined for the playgrounds and the homes. Moreover, as the District Court noted, the prejudice was compounded due to the fact that the argument was in the nature of a "golden rule" argument.

Petitioner also relies on the case of Blair v. State, 406 So.2d 1103(Fla.1981). It is respectfully submitted that the District Court's decision comports with all of the

principles and tenets set forth in that case.

Petitioner also relies on Darden v. State, 329 So.2d 287 (Fla. 1976), cert. den. 430 U.S.704, 97 Supreme Court 308, 50 L.Ed.2d 282(1977). That case casts no shadow on the validity of the District Court's decision. The refusal of this court to reverse in Darden was based primarily on the fact that the defendant's attorney had opened the door to the prosecutor's characterization of the person who perpetrated the heinous crimes involved. The defendant's attorney, prior to the prosecutor's argument, had said that the one who committed the offense "would have to be a vicious animal". Id. at 289. Additionally, this Court emphasized in Darden that the defendant's trial counsel had injected his own personal views on the evidence prior to the prosecutor's doing same.

Moreover, as in the Breedlove case, the Darden prosecutor's comments were supported by evidence in the record. The comments did not deal with matters totally missing from the record and completely without support as did the comments of the prosecutor in the case at bar.

This Court further stated that the Darden prosecutor's statements would ordinarily have been a violation of The Code of Professional Conduct, but that in the particular circumstances of that case, the comments were harmless error when the totality of the record was considered. Importantly,

it was also noted that the language of the prosecutor, even though supported by evidence in the record, might have been reversible error if the comments had been used in regard to a less heinous set of crimes.

Petitioner also cites the United States Supreme Court case of Donnelly v. De Christoforo, 416 U.S.637, 40 L.Ed.2d 431, 94 S.Ct. 1868(1974). However, the prosecutor's comments in the Donnelly case were admittedly ambiguous, were but a brief moment in an extended trial, and were followed by a sustained objection with specific disapproving instructions.

The Donnelly trial court gave the following instruction:

> "Closing arguments are not evidence for your consideration....
>
> Now in his closing, the District Attorney, I noted, made a statement 'I don't know what they want you to do by way of a verdict. They said they hoped that you find him not guilty. I quite frankly think that they hope that you find him guilty of something a little less than first-degree murder.' There is no evidence of that whatsoever, of course, you are instructed to disregard that statement made by the District Attorney.
>
> "Consider the case as though no such statement was made." Id.,40 L.Ed.2d 431 at 435.

Obviously, the Donnelly case has no bearing on a case where, as here, the comments were greatly more prejudicial and inflammatory, the objection of the defense counsel was overruled, and no curative instructions were given to the jury.

From the above discussion, it can be seen that the cases urged by Petitioner in support of its argument that the District Court erred in its reversal are not persuasive.

On the other hand, many recent Florida cases support the validity of the District Court's decision on this issue: Jackson v. State, 421 So.2d 15(Fla.3d DCA 1982); Coleman v. State, 420 So.2d 354(Fla.5th DCA 1982); Hines v. State, 425 So.2d 589(Fla.3d DCA 1982); Murray v. State, 425 So.2d 157(Fla.4th DCA 1983); Green v. State, ___So.2d___(Fla.3d DCA, Case No. 81-2487, March 1, 1983); Lipman v. State, __So.2d__ (Fla.1st DCA, Case No. AG-128, March 18, 1983); and Edwards v. State, ___So.2d___(Fla.3d DCA, Case No. 82-731, March 22, 1983).

In summary, the defense of entrapment in the case at bar was a close question for jury determination, and that determination was governed primarily, and possibly totally, by the jury's view of Respondent's credibility vis-a-vis the credibility of the informant and undercover agent. Under such circumstances, it is clear that the test of Chapman v. California, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705(1967), required the District Court's reversal of the judgment and sentence. That is, in light of the record in this case, the District Court could not have been satisfied beyond a reasonable doubt that the improper argument of the prosecutor did not contribute to Respondent's conviction.

POINT V

THE JUDGMENT, CONVICTION AND SENTENCE OF RESPONDENT FOR THE USE OF A FIREARM DURING THE COURSE OF A FELONY WAS CORRECTLY REVERSED BY THE DISTRICT COURT OF APPEAL BECAUSE THE SAID CRIME DEPENDS ON THE VALIDITY OF THE CONVICTIONS FOR THE UNDERLYING FELONIES.

Since the Respondent's conviction for the use of a firearm during the course of a felony rests entirely on the validity of the convictions for the underlying felonies, the District Court was correct in reversing the firearm conviction. As this Court has stated in Redondo v. State, 403 So.2d 954(Fla. 1981):

> The existence of a felony or an attempted felony is an essential element of the crime of unlawful possession of a firearm during the commission of a felony. Sec. 790.07(2), Fla.Stat.(1977). . .a conviction of unlawful possession of a firearm during the commission of a felony must stand or fall in conjunction with the underlying felony. Id. at 956.

Thus, Respondent's conviction of unlawful use of a firearm during the course of a felony was correctly deemed by the District Court to be invalid.

CONCLUSION

For the reasons stated under Points I and III above, Respondent respectfully requests that this Court decline review of the issues presented by Petitioner thereby deeming the decision of the District Court of Appeal below final. Alternatively, and for the reasons stated in all of the arguments above, Respondent respectfully requests that this Court affirm the District Court of Appeal's reversal of the Respondent's convictions.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the ANSWER BRIEF OF RESPONDENT has been furnished to LARRY KADEN, Esquire, Office of the Attorney General, The Capitol, Tallahassee, Florida 32301, by regular U. S. Mail, this 22nd day of April, 1983.

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