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IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

PETITIONER,

-VS-

BOYCE E. GLOSSON, et al.,

RESPONDENTS.

CASE NO. 64688

FIRST DCA NO. AO-431

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PETITIONER'S JURISDICTIONAL BRIEF

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TOPICAL INDEX

	Page
PRELIMINARY STATEMENT	1
STATEMENT OF CASE AND FACTS	2
STATEMENT OF JURISDICTION	2
ARGUMENT TO ISSUE I	3
ARGUMENT TO ISSUE II	4
ARGUMENT TO ISSUE III	6
CONCLUSION	10
CERTIFICATE OF SERVICE	11

TABLE OF CITATIONS

Armstrong v. City of Tampa, 106 So.2d 407, 409 (Fla. 1958)	3
Hampton v. United States, 425 U.S. 484 (1976)	7,10
Hill v. State, 238 So.2d 608 (Fla. 1970)	4
Lawrence v. State, 357 So.2d 424 (Fla. 1st DCA 1978), cert.denied, 367 So.2d 1125 (Fla. 1979), cert.denied, 444 U.S. 847 (1979)	10
Mancini v. State, 312 So.2d 732 (Fla. 1975)	6
Michigan v. Long, ___ U.S. ___, 103 S.Ct. ___, 77 L.Ed.2d 1201 (1983)	3
Ogle v. Pepin, 273 So.2d 391, 393 (Fla. 1973)	3
Owen v. State, ___ So.2d ___ (Fla. 1st DCA 1983), 8 F.L.W. 2881.	10
Potvin v. Keller, 313 So.2d 703 (Fla. 1975)	4

TABLE OF CITATIONS (CONT'D)

	Page
Richardson v. State, 246 So.2d 771 (Fla.1971)	
Sarno v. State, 424 So.2d 829 (Fla. 3rd DCA 1982), pet. for rev. denied,434 So.2d 888 (Fla.1983)	6,8,9
Sorrells v. United States, 287 U.S. 435 (1932)	7
Spradley v. State, 293 So.2d 697, 701 (Fla.1974)	5
State v. Brider, 386 So.2d 818 (Fla. 2nd DCA 1980), pet. for rev. denied, 392 So.2d 1372 (Fla.1980)	6,8,9
State v. Eshuk, 347 So.2d 704 (Fla. 3rd DCA 1977)	4,6,7,8,9
State v. Glosson et. al, ___So.2d___(Fla. 1st DCA 1983), 8 F.L.W. 1873, opinion on rehearing, 8 F.L.W. 2883	1,2
Taylor v. Tampa Electric Co., 356 So.2d 260 (Fla. 1978)	5
United States v. Joseph, 533 F.2d 282 (5th Cir. 1976), cert.denied, 431 U.S. 905 (1977)	3
United States v. Russell, 411 U.S. 423 (1973)	7
Williamson v. United States, 311 F.2d 441 (5th Cir. 1962)	3,7,8

OTHERS

Florida Constitution, Article V, Section 3(b)(3)	2
Florida Constitution, Article VIII, Section 1 (d)	5
Florida Constitution, Article V, Section 17	5
Fla.R.App.P. 9.030(a)(2)(A)(ii-iv)	2,4
Fla. Stat., Chapter 27, 30	5
Fla. Stat., §932.704	5
United States Constitution, Article SIV, Section 1	3

IN THE SUPREMEM COURT OF FLORIDA

STATE OF FLORIDA,

PETITIONER, CASE NO. ________

-VS- FIRST DCA NO. AO-431

BOYCE E. GLOSSON, el al.,

RESPONDENTS.

PETITIONER'S JURISDICTIONAL BRIEF

PRELIMINARY STATEMENT

The State of Florida, the prosecuting authority and appellee below in State v. Glosson et al., ___So.2d___ (Fla. 1st DCA 1983), 8 F.L.W. 1873, opinion on rehearing, 8 F.L.W. 2883, and the petitioner here, will be referred to as "petitioner." Boyce E. Glosson, Matthew A. Brozna, Robert C. Brooke, James P. Sheridan, Howard T. Smith, and Frances Lorraine Gonzalez, the criminal defendants and appellees below and respondents here, will be referred to as "respondents."

Conformed copies of the First District's initial decision, petitioner's "Motion For Rehearing; Suggestion For Certification of Decisional Conflict and Certification of Questions of Great Public Importance; and Motion For Rehearing En Banc", and the First District's decision on rehearing granted, over which review is sought, are attached to this brief as an appendix pursuant to Fla.R.App.P. 9.120 (d).

All emphasis is supplied by petitioner unless otherwise indicated.

STATEMENT OF THE CASE AND FACTS

Those details relevant to a resolution of the threshold jurisdictional question are related in the opinions of the First District in State v. Glosson, which petitioner accepts.

STATEMENT OF JURISDICTION

The discretionary jurisdiction of this Court is invoked under Article V, Section 3(b)(3) of the Constitution of the State of Florida, and Fla.R.App.P. 9.030(a)(2) (A)(ii-iv) on the grounds that the decision below expressly construes provisions of both the federal and state constitutions; expressly affects two classes of constitutional and state officers; and expressly and directly conflicts with three decisions of two other district courts of appeal on the same question of law.

ISSUE I

THE FIRST DISTRICT'S DECISION THAT PETITIONER'S CONTINGENT FEE ARRANGEMENT WITH A PROSPECTIVE WITNESS VIOLATED RESPONDENTS' RIGHT TO "CONSTITUTIONAL DUE PROCESS" OF LAW EXPRESSLY CONSTRUES THE DUE PROCESS CLAUSES OF THE CONSTITUTION OF THE UNITED STATES, ARTICLE XIV, SECTION 1, AND THE CONSTITUTION OF THE STATE OF FLORIDA, ARTICLE I, SECTION 9

ARGUMENT

In order to expressly construe a provision of the federal and/or the state constitution for the purpose of invoking this Court's discretionary jurisdiction under Fla. R.App.P. 9.030 (a)(2)(A)(ii), a district court's decision must explicitly "explain, define or otherwise eliminate existing doubts arising from the language or terms of the constitutional provision." Ogle v. Pepin, 273 So.2d 391, 393 (Fla.1973), quoting Armstrong v. City of Tampa, 106 So.2d 407, 409 (Fla.1958). Here, the First District's decision explicitly explains that petitioner's contingent fee arrangement with prospective witness Norwood Lee Wilson violated respondents' rights to "constitutional due process." The Court did not specify whether it was construing the federal constitution or the state constitution, or both. Inasmuch as the First District's interpretation of "due process" is based largely on the federal decisions of Williamson v. United States, 311 F.2d 441 (5th Cir. 1962) and United States v. Joseph, 533 F.2d 282 (5th Cir. 1976), cert. denied, 431 U.S. 905 (1977), the decision clearly construes the due process clause of the Constitution of the United States, Article XIV, Section 1, see Michigan v. Long, ___U.S.___, 103 S.Ct. ___, 77 L.Ed. 2d 1201

(1983), which is sufficient to invoke this Court's jurisdiction, see Potvin v. Keller, 313 So.2d 703 (Fla. 1975). However, petitioner would assert that the First District's interpretation was also based on the due process clause of the Constitution of the State of Florida, Article I, Section 9, in view of the cite to State v. Eshuk, 347 So.2d 704 (Fla. 3rd DCA 1977). See Hill v. State, 238 So.2d 608 (Fla. 1970) for a case in which this Court accepted jurisdiction over a lower court decision which construed portions of both the federal and state constitutions. Whether the decision below construes only the federal due process clause, or both the federal and the state due process clauses, is really an academic point insofar as these clauses apparently share a common scope and petitioner need show the First District's reliance on only one of the clauses to secure certiorari review. Petitioner defies respondents to argue that the decision below construes neither the federal constitution nor the state constitution.

ISSUE II

THE FIRST DISTRICT'S DECISION THAT PETITIONER'S CONTINGENT FEE ARRANGEMENT WITH A PROSPECTIVE WITNESS WAS ILLEGAL AFFECTS THE AUTHORITY OF TWO CLASSES OF CONSTITUTIONAL AND STATE OFFICERS, SHERIFFS AND STATE ATTORNEYS, TO DISBURSE FUNDS AND ENFORCE THE LAW.

ARGUMENT

In order to affect a class of constitutional or state officers for the purpose of invoking this Court's discretionary jurisdiction under Fla.R.App.P. 9.030(a)(2)(A)(iii), a district court's decision must "directly and, in some way, exclusively

affect the duties, powers, validity, formation, termination or regulation of a particular class" of said officers, Spradley v. State, 293 So.2d 697, 701 (Fla.1974).[1] Sheriffs are both constitutional and state officers, see Article VIII, Section 1(d) of the Florida Constitution and Chapter 30, Fla. Stat., as are State Attorneys, see Article V, Section 17 of the Florida Constitution and Chapter 27, Fla. Stat. The decision below holds that Sheriffs and State Attorneys may not legally arrange that witnesses testifying for the State against criminal defendants receive a percentage of all civil forfeitures accruing to the Sheriffs under §932.704, Fla. Stat. subsequent to a conviction. Thus, the decision below directly and exclusively affects the authority of these constitutional and state officers to disburse funds,which is sufficient to invoke this Court's jurisdiction, see Taylor v. Tampa Electric Co., 356 So.2d 260 (Fla. 1978) (decision affecting the authority of circuit court clerks to disburse funds justified certiorari review); Richardson v. State, 246 So.2d 771 (Fla.1971). Review should also ensue from the fact that the decision strips law enforcement officers of a useful tool for uncovering violations of narcotics laws.

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1 Emphasis in orginal.

ISSUE III

THE FIRST DISTRICT'S DECISION THAT PETITIONER'S CONTINGENT FEE ARRANGEMENT WITH A PROSEPECTIVE WITNESS VIOLATED RESPONDENTS' RIGHTS TO "CONSTITUTIONAL DUE PROCESS" OF LAW EXPRESSLY CONFLICTS WITH THE THIRD DISTRICT'S DECISIONS OF STATE V. ESHUK, 347 SO.2d 704 (FLA. 3rd DCA 1977) AND SARNO V. STATE, 424 So.2d 829 (FLA. 3rd DCA 1982), PET. FOR REV. DENIED, 434 SO.2d 888 (FLA.1983) AND WITH THE SECOND DISTRICT'S DECISION OF STATE V. BRIDER, 386 SO. 2d 818 (FLA. 2nd DCA 1980), PET. FOR REV. DENIED, 392 SO.2d 1372 (FLA. 1980), ON THE SAME QUESTION OF LAW.

ARGUMENT

In order for two district court decisions to be in express and direct conflict for the purpose of invoking this Court's discretionary jurisdiction under Fla.R.App.P. 9.030(a)(2)(A)(iv), the decisions should speak to the same point of law, in factual contexts of sufficient similarity to permit the inference that the result in each case would have been different had the deciding court employed the reasoning of its sister court. See generally Mancini v. State, 312 So.2d 732 (Fla. 1975). The decision of the First District that petitioner's contingent fee arrangement with a prospective witness violated respondents' rights to "constitutional due process" of law conflicts with the decisions of the Third District in State v. Eshuk, 347 So. 2d 704 (Fla. 3rd DCA 1977), and Sarno v. State, 424 So.2d 829 (Fla. 3rd DCA 1982), pet. for rev.denied, 434 So.2d 888 (Fla.1983), and with the decision of the Second District in State v. Brider, 386 So.2d 818 (Fla. 2nd DCA 1980), pet. for rev. denied, 392 So.2d 1372 (Fla.1980). To appreciate these conflicts, the Court

must first understand that the due process defense is wholly distinct from the entrapment defense. A criminal defendant who argues that he was not predisposed to commit an offense into which he was lured by a government agent asserts the entrapment defense, see Sorrells v. United States, 287 U.S. 435 (1932), while a defendant who argues that the conduct of a government agent in luring him to commit an offense was so outrageous as to bar a conviction notwithstanding his prediposition asserts the due process defense, see United States v. Russell, 411 U.S. 423 (1973); Hampton v. United States, 425 U.S. 484 (1976). The Court must secondly understand that, with all due respect, the First, Second and Third Districts have all experienced difficulty in perceiving the above-cited distinction.

In State v. Eshuk, the Third District rejected the due process defense of a defendant who was convicted of selling drugs to an undercover officer to whom he had been introduced by a government agent with a known criminal record, reasoning that the state's failure to preselect the defendant as a target and its promise to pay the agent for his services in the future only if he proved credible rendered the Williamson v. United States prohibitions against preselection and contingent fee payments to agents inapplicable. In the decision below, the First District essentially turned the Third District's interpretation of Williamson v. United States on its head, applying that decision to accept the due process defense of defendants who were accused of buying drugs from a government agent even though the State had not pre-selected the defendants as targets and had promised to pay the agent for his services in the future only if he proved cooperative.

The fact that both the State v. Eshuk court and the First District misconstrued the Williamson v. United States entrapment decision as a due process decision[2] in no way dissolves their starkly conflicting results. Indeed, the dissenting judge in Eshuk would have sustanied the due process defense by relying upon Williamson -- just as the marjority did below.

In Sarno v. State, the Third District rejected the due process defense of defendants who were convicted of buying drugs from a drug-using government agent, even though the agent was allowed to retain some of the profits he had realized from his sales. If the Court believes the contingent fee arrangement validated by the Third District in State v. Eshuk can be distinguished from that condemned below, it certainly could not then deny that the prepaid fee arrangement validated by the Third District in Sarno v. State would be indistinguishable from that condemned below. Thus, even if the decision below does not conflict with State v. Eshuk, it conflicts with Sarno v. State.

The decision below also conflicts in effect with State v. Brider, although the Second District's difficulty in distinguishing the due process defense from the entrapment defense in that case renders the conflict less immediately visible. In State v. Brider, the Second District rejected the "entrapment" defense of a defendant who bought drugs from a third party who had been contacted by and supplied cannabis by a government agent. By focusing upon the nature of the governmental conduct in addition to the defendant's predisposition, the State v. Brider court

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[2]The Williamson decision was ultimately based on the government's failure to demonstrate predisposition, rather than upon any governmental misconduct.

actually rejected the due process defense in addition to the entrapment defense. Insofar as the decision below condemns the government practice of supplying defendants with drugs and then later prosecuting them for conspiring to traffic in these drugs, it conflicts with the State v. Brider decision sanctioning this practice.

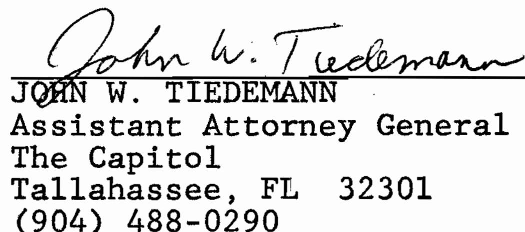
Clearly, had the First District applied the reasoning of the Third District in Eshuk and Sarno and the Second District in Brider, the reult in the instant case would have been different. The converse is also true. This warrants the granting of conflict certiorari jurisdiction.

CONCLUSION

Petitioner has established fully seven bases upon which this Court may fairly invoke its certiorari jurisdiction to review the decision below. Recognizing that in a jurisdictional brief "[i]t is not appropriate to argue the merits of the substantive issues involed in the case," Fla.R.App.P. 9.120 (d) Committee Note, petitioner would nonetheless advance two reasons why this Court should exercise its discretion to take this case. First, from his contacts with numerous State Attorneys and the Florida Sherrif's Association, undersigned counsel can represent that the decision below is having a chilling effect on the administration of justice throughout this State. Second, the decision appears at odds with the decisions of Hampton v. United States and Lawrence v. State, 357 So.2d 424 (Fla. 1st DCA 1978), cert. denied, 367 So.2d 1125 (Fla. 1979), cert. denied, 444 U.S. 847 (1979), as recognized by Judge Nimmons in his dissent, and also appears at odds with Owen v. State, ___ So.2d ___ (Fla. 1st DCA 1983), 8 F.L.W. 2881. The necessity for binding and correct statewide standards governing the due process defense requires that this Court grant certiorari and decide this case on the merits.

Respectfully submitted,

JIM SMITH
Attorney General



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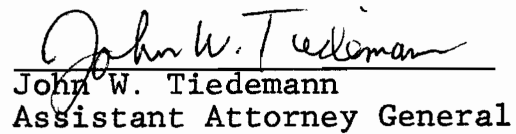
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Brief has been forwarded to Robert G. Duval, 12230 Northwest 7th Avenue, Miami, FL 33168; Harvey Robbins, 1100 Northeast 125th Street, Suite 109, North Miami, FL 33161; Harvie S. Duval, 1680 Northeast 135th Street, North Miami, FL 33161, via U.S. Mail, this 30th day of December 1983.



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