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IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Petitioner,

vs. Case No. 64,688

BOYCE E. GLOSSON, et al.

Respondents.

BRIEF OF PETITIONER
ON THE MERITS

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PRELIMINARY STATEMENT

Petitioner, the State of Florida, the prosecuting authority in the criminal proceeding below and appellant in State v. Glosson, 441 So.2d 1178 (Fla. 1st DCA 1983), the decision under review, will be referred to as "the State." Boyce E. Glosson, Matthew A. Brozna, Robert C. Brooke, James P. Sheridan, Harold T. Smith, and Frances Lorraine Gonzalez, the criminal defendants and appellees in the proceedings below, will be referred to as "respondent Glosson", for example, individually, and as "the respondents" collectively.

References to the six-volume record on appeal will be designated by the volume number, with further descriptive information if necessary, and the page number. Example, "(Vol. V, proceedings of August 2, 1982, p.3)."

All emphasis in this brief is supplied by the State unless otherwise indicated.

STATEMENT OF THE CASE AND FACTS

The matters essential to a resolution of the issue raised upon certiorari are as follows:

By amended information filed on July 15, 1982, in the Circuit Court for the Eighth Judicial Circuit in and for Levy County, Florida, the respondents were charged with possessing from between one hundred and two thousand pounds of cannabis on June 3 (Count I), and conspiring with Norwood Lee Wilson to traffic in more than one hundred pounds of cannabis from May 15 to June 3 (Count II) (Vol. I, 1-2).[1] The respondents filed numerous motions seeking discovery of certain police reports (Vol.I, 3-7) and dismissal of the information on the dual grounds of entrapment and prosecutorial misconduct (Vol.I, 8-10, 13-15, 18-19,22-23).

The State traversed the latter motions, alleging in part that the respondents were predisposed to commit the offense for which they had been charged (Vol.I, 11-12,16-17,20-21,24-25). Hearings which were held on August 2 (Vol.V, proceedings of August 2, 1982, 1-16) and September 9 (Vol.V, proceedings of

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1 Respondent Gonzalez was charged only under Count II. Undersigned counsel has heard through the grapevine that Ms. Gonzalez has been murdered, and invites counsel to clairfy the matter on the record.

September 9, 1982, 1-85; Vol.VI, 86-110) resulted in preliminary dispositions favorable to the defense regarding discovery and to the State regarding the motions to dismiss (Vol.I, 52-60). However, the respondentsrefiled their motions to dismiss (Vol. I, 26-43,61-65,69-75), averring with specificity that the events which led to the criminal charges against them had been unethically orchestrated by governmental agents. These motion were not traversed. A further hearing was held on this and other matters on September 30 before Circuit Judge Osee Fagan (Vol.VI, proceedings of September 30, 1982, 1-95). After much verbal jousting, the State and the defense agreed upon a stipulated set of facts upon which the trial court could dispose of the respondents' Fla.R.Crim.P. 3.190(c)(4) motions to dismiss:

> Fact number one. The defense of entrapment [sic: due process] has been asserted by each of the defendants charged by information in this case.
>
> Number two. The State's chief witness in this matter, Norwood Lee Wilson, entered into an oral contract with the Sheriff of Levy County, Florida.
>
> Number three. The above-mentioned contract was entered into with full knowledge, concurrence and carried out under the investigative supervision of the State Attorney's Office of the Eighth Judicial Circuit.
>
> Number four. The conditions of this contract with Norwood Lee Wilson was for Wilson to receive ten percent of all civil forfeiture proceedings filed as a result of the criminal investigations which he initiated and in which he participated.
>
> Number five. The contingency fee was to be paid out of civil forfeitures going to the Levy County Sheriff's Department.
>
> Number six. Norwood Lee Wilson is required to testify and cooperate in the prosecutionof the criminal cases filed as a result of the investigations in which he initiated and in which he participated in order to collect the contingent fee.
>
> Number seven. This case is one of the aforementioned cases.

> Number eight. The successful prosecution of this case cannot be accomplished without the testimony, participation, and cooperation of Norwood Lee Wilson.

(Vol.VI, 87-88). The trial court received a number of defense depositions of State witnesses into evidence which revealed, among other things, that most of Wilson's discussions with the respondents had been preserved on tape (Vol.VI, 6,73,89; Vol.I, 3-5, 189-193; 200; Vol.II, 1-5,10,53-55,63-64; Vol.III, 136, 139,147). Based upon the stipulated facts and the matters discussed and received at the hearing, the trial court entered an order on October 6 dismissing the information on the basis of "prosecutorial misconduct resulting in the denial of constitutional due process" (Vol.I, 76-80). The trial court specifically found that the actions of trial counsel for the State violated DR 7-109(c) and EC 7-28 of the Code of Professional Responsibility, which proscribe an attorney's payment of contingent fees to a witness, and pursuant to DR 1-102 & 103 referred the matter to the Grievance Committee of the Eighth Judicial Circuit. The State timely appealed both the trial court's order of dismissal and its order of discovery of the police reports (Vol.I, 82-82). The State's subsequent compliance with the order of discovery rendered the latter matter moot; hence, only the propriety of the order of dismissal was raised as an issue upon appeal.

On appeal, the State argued that, for a number of reasons theretofore urged, the trial court had erred as a matter of law in dismissing the information on the basis of prosecutorial misconduct resulting in the denial of respondents' rights to constitutional due process of law. The respondents

disagreed, and also argued that dismissal of the conspiracy count would have been alternatively justified because that count had defectively alleged that State agent Wilson was alone to commit an act essential to proving the conspiracy, and also defectively failed to charge an offense cognizable under Florida law. In its initial decision of July 15, 1983, State v. Glosson, 9 F.L.W. 1873, the First District, in an opinion written by Judge Joanos and concurred in by Judge Larry Smith, affirmed the dismissal over the vigorous dissent of Judge Nimmons. The majority indicated in passing that the State's argument that the dismissal of the charges had improperly withdrawn its right to have a jury pass upon the credibility of its witnesses was uncompelling. The gravamen of the majority's decision, however, was that the Stat's "prosecutorial misconduct" in arranging for a narcotics agent to receive a percentage of civil forfeitures obtained from narcotics defendants whom he helped to prosecute violated respondents' rights to due process of law under Williamson v. United States, 311 F.2d 441 (5th Cir. 1962), notwithstanding the State's attempt to "argue" that this case was controlled not by Williamson v. United States but by United States v. Joseph, 533 F.2d 282 (5th Cir. 1976), cert. denied, 431 U.S. 905 (1977).

In a timely motion for rehearing, suggestion for certification of decisional conflict and certification of questions of great public importnace, and motion for rehearing en banc, the State pointed out that neither side had even so much as mentioned either Williamson v. United States or United States v. Joseph in its filings, and expressly repudiated the argument which the First District had attributed to it. On December 13, the First District

"granted" the State's motion for rehearing, but altered its initial opinion only to the extent of stating that this repudiated "argument" was "[i]nherent in the state's citation to State v. Eshuk, 347 So.2d 704 (Fla. 3rd DCA 1977)", State v. Glosson, 441 So.2d 1178, 1179 (Fla. 1st DCA 1983).

The State then timely filed a notice to invoke this Court's discretionary jurisdiction on the grounds that the First District's decision expressly construed provisions of both the federal and state constitutions; expressly affected two classes of constitutional and state officers; and expressly and directly conflicted with three decisions of two other district courts of appeal on the same question of law. The State's jurisdictional brief, to which respondents did not respond, followed. On June 18, 1984, this Court accepted certiorari review over the caseby a 4-3 vote.

ISSUE

THE FIRST DISTRICT AS MATTER OF LAW ERRED IN AFFIRMING THE TRIAL COURT'S ORDER DISMISSING THE INFORMATION ON THE BASIS OF PROSECUTORIAL MISCONDUCT RESULTING IN THE DENIAL OF RESPONDENTS' RIGHTS TO CONSTITUTIONAL DUE PROCESS OF LAW.

ARGUMENT

The State emphatically believes that the First District erred as a matter of law in affirming the trial court's pretrial order dismissing the information pursuant to Fla.R.Crim.P. 3.190 (c)(4) because the State's contingent fee arrangement with Norwood Lee Wilson violated respondents' rights to constitutional due process of law. To highlight the error of the lower courts, the Stae will first discuss the evolution and development of the due process defense, thereby demonstrating its substantive inapplicability to the instant case; will then expose its procedural inapplicability to the instant case; and will finally show why several ancillary issues upon which the respondents have heretofore dwelled are irrelevant to this litigation.

A. Evolution and Development of the Due Process Defense; Substantive Inapplicability

Fundamentally, the Court should bear in mind that the due process defense is wholly distinct from the entrapment defense, though the two are often pled conjunctively. The entrapment defense, in which a criminal defendant argues that he was not predisposed to commit an offense into which he was lured by a government agent, has long been with us, see Sorrells v. United States, 287 U.S. 435 (1932). However, the due process defense,

in which the defendant argues that the conduct of a government agent in luring him to commit an offense was so outrageous as to deny him due process of law notwithstanding his predisposition, is only eleven years old. This defense has its formal origins in dicta in the entrapment decision of United States v. Russell, 411 U.S. 423, 432-433 (1973) to the effect that there could come some point at which "the conduct of law enforcement agents is so outrageous that due process principles would absolutely bar the government from invoking judicial process to obtain a conviction" notwithstanding the predispostion of a defendant to commit the crime at issue. Later, in Hampton v. United States, 425 U.S. 484,491-492 (1976), a split court severly limited the possible emergence of an effective due process defense from the United States v. Russell dicta, the Court's plurality opinion even going so far as to suggest that the remedy for outrageous government conduct should lie "not in freeing the equally culpable defendant", but in prosecuting the offending agent. Cf. United States v. Hastings, ___U.S.___ (1983), 33 Crim.L.Rptr. 3091, 3093, footnote 5. The concurring opinion in Hampton v. United States suggests that under the language of the plurality opinion "the concept of fundamental fairness inherent in the guarantee of due process would never prevent the conviction of a predisposed defendant, regardless of the outrageousness of police behavior in light of the surrounding circumstances." Id, 425 U.S. 484,493. The concurring justices, while in general resisting the per se approach of the plurality, did indicate a willingness to apply this approach to hard-core distributers of narcotics. Id., 425 U.S. 483,494, footnote 5. The State believes

that under Hampton v. United States, the due process defense, rasied by a predisposed defendant, could be sustained only in cases involving acts or threats of violence by government agents.

Thus, Williamson v. United States, upon which the First District largely predicated its decision here, was decided eleven years before the due process defense had emerged. Not suprisingly, the Fifth Circuit's decision to reverse the convictions of two defendants who had been preselected and enticed by a paid government agent to sell illegal liquor was predicated not upon any finding that this conduct was outrageous and had denied the defendants due process, but rather upon the government's failure to demonstrate predisposition, thereby establishing a prima facie case of entrapment. The fact that Williamson was retried and convicted minus the testimony of the paid government agent, and that this conviction was affirmed upon appeal, Williamson v. United States, 340 F.2d 612 (5th Cir. 1965), cert. denied, 381 U.S.950 (1965), confirms that the Fifth Circuit's initial decision was not legally predicated upon the nature of the governmental conduct. The First District's reliance upon the decision as validating a due process defense was thus thoroughly misplaced, all the more so because the Fifth Circuit, as a result of the United States v. Russell and Hampton v. United States decisions discussed previously, has taken a progressively more restrictive view of the defense. Compare, in this order, United States v. Graves, 556 F.2d 1319 (5th Cir. 1977), cert. denied, 435 U.S. 923 (1978), United States v. Thomas, 567 F.2d 638 (5th Cir. 1978), and United States v. Gray, 626 F.2d 492 (5th Cir. 1980), cert. denied. 449 U.S. 1038 (1980), and note that in United States v. Gianni, 678 F.2d 956, 960 (11th Cir. 1982), cert. denied, ___U.S.___,103 S.Ct. 491 (1983), the Eleventh Circuit stated that "neither the

Supreme Court nor the Fifth or Eleventh Circuit has reversed a conviction" based upon a due process defense.

Moreover, the continued validity of Williamson v. United States is highly suspect even on its own terms as an entrapment decision. In United States v. Bueno, 447 F.2d 903, 904 (5th Cir. 1971), cert. denied, 411 U.S. 949 (1973), the Fifth Circuit relied upon Williamson v. United States to hold that entrapment occurs "as a matter of law when a government informer furnishes the narcotics to the defendant for sale to a government agent." In United States v. Graves, however, the Court indicated in dicta that the continued validity of United States v. Bueno was suspect in view of the Supreme Court's decision in Hampton v. United States. In United States v. Anderton, 679 F.2d 1199 (5th Cir. 1982), the Fifth Circuit confirmed that Hampton v. United States, by holding that the focus in an entrapment defense must be on the predisposition of the defendant rather than upon the nautre of the government's conduct, had effectively overruled United States v. Bueno. If United States v. Bueno is no longer good law, it stands to reason that Williamson v. United States, upon which United States v. Bueno was based, is also no longer good law.

In United States v. Joseph, the Fifth Circuit, in rejecting the due process defense of a defendant who had sold heroin to a police officer to whom he had been introduced by a paid government agent, distinguished Williamson v. United States on the basis that Joseph, unlike Williamson and his co-defendant, had not been preselected by the agent for enticement into crime. Accord, United States v. Lane, 693 F.2d 385 (5th Cir. 1982). That the Fifth Circuit has not as yet distinguished Williamson

v. United States either upon the basis that that decision involved entrapment, or upon the basis that it is no longer wholly good law, is inconsistent with the Fifth Circuit's overruling of United States v. Bueno, and is probably attributable to a sporadic difficulty in conceptually separtating the due process defense from the entrapment defense. The First District would seem to have experienced this same difficulty in interpreting Williamson v. United States and United States v. Joseph as it did--a difficulty which, interestingly enough, the Third District also experienced in the conflicting decision of State v. Eshuk, to be discussed infra. To summarize, the State did not seek to distinguish Williamson v. United States from United States v. Joseph because the former is an entrapment decision of currently debatable validity, while the latter, though it nominally supports the State's position, is a conceptually ill-conceived due process decision which does not acknowledge the seminal due process decision of Hampton v. United States. For these same reasons, the First District should not have relied upon the cases in fashioning its decision.[2] There was,

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2 In the name of judicial accountability, the First District should also not, in a case where it condemned the State for prosecutorial misconduct, have insisted upon attributing to the State an argument it first did not make and then expressly repudiated. To err is human, of course, but most courts correct, rather then cover, their errors on rehearing. See, e.g., State v. Gibson, So.2d (Fla. 1984), 9 F.L.W. 234; Giuliano v. Wainwright, 416 So.2d 1180 (Fla. 4th DCA 1982).

as noted, abundant federal authority in support of the State's position upon which the First District could and should have relied, see e.g. United State v. Thomas, United State v. Gianni, and United States v. Kelly, 707 F.2d 1460 (D.C. Cir. 1983), cert. denied, ___U.S.___ 104 S.Ct. 264 (1984), the latter involving the noted former Florida Congressman Richard Kelly; see also United States v. Corcione, 592 F.2d 111 (2nd Cir. 1979), cert. denied, 445 U.S. 975 (1980); United States v. McQuin, 612 F.2d 1193 (9th Cir. 1980), cert. denied, 445 U.S. 954, 955 (1980); and United States v. Jannotti, 673 F.2d 578 (3rd Cir. 1981), cert. denied, 457 U.S. 1106 (1982); compare United States v. Twigg, 588 F.2d 373 (3rd Cir. 1978).

There was also, as will be developed shortly, abundant Florida authority in support of the State's position upon which the First District could and should have relied. However, as a prelude to developing this authority, the State would briefly digress to note that the First District's misconception of Williamson v. United States as a due process decision is additionally explainable, though not excusable, by the fact that there are several cases in which both the United States Supreme Court and the Florida courts retrospectively appear to have considered the defense prior to its formal emergence, though the defense was ultimately rejected in each instance. In Frisbie v. Collins, 342 U.S. 519 (1952), for example, the Supreme Court affirmed the Michigan murder conviction of a defendant whose presence at trial had been secured only as a result of his forcible abduction from Chicago by Michigan

police officers. The Supreme Court noted that although the defendant's abduction may have been in violation of the Federal Kidnapping Act, it entailed no violation of his right to due process of law. This decision is consistent with the State's aforecited interpretation of the Court's subsequent decision in Hampton v. United States; and certainly paying an informant for his assistance in bringing a case to trial is not "outrageous" than securing the presence of the defendant himself at trial by kidnapping him! In Peters v. Brown, 55 So.2d 334 (Fla. 1951), the appellant, a licensed dental technician, was, under a subsequently repealed civil statute, permanently enjoined from practicing his profession solely on the basis of hearsay testimony from two paid witnesses that he had practiced dentistry upon them without a license. Upon appeal, this Court stated that while the statute in question probably constituted an illegal bill of attainder, the evidence from the two paid witnesses was equitably suspect both in view of its lack of independent corroboration and because the witnesses had been directed to approach the appellant only upon the basis of an unspecified "suspicion" that he was illegally practicing dentistry. The Court also noted that the evidence was in any event insufficient to prove that the appellant had crossed the blurry line between acting as a dental technicial and acting as a dentist. Peters v. Brown is no longer good law. In Mitchell v. Gillespie, 164 So.2d 867 (Fla. 1st DCA 1964), the defendant was permanently enjoined from practicing dentistry when two salaried state investigators, who had responded to

complaints which had been lodged against the defendant, testified that he had practiced dentistry upon them unlawfully. In so holding, the First District examined the original record in the Peters v. Brown case and politely questioned the soundness of this Court's finding that the unspecified "suspicion" that that appellant had been practicing dentistry illegally was an inadequate basis upon which to predicate governmental investigation. The court held, in language critical to the case at bar, that "whether an investigation of one suspected of violating the law had its genesis in a mere suspicion or in a well-founded belief may be material to the trier of fact in judging the credibility of the investigators' testimony, and the weight which should be accorded it in resolving the issues of the case, but it can have no bearing on the admissibility of such testimony as competent evidence in the case." Id., 872. "The fact that evidence in a case consists solely of the testimony of paid investigators is material only in determining the credibility of such witnesses and the weight to be accorded their testimony." Id., 871. On petition for writ of certiorari, this Court accepted in full the First Dsitrict's opinion modifying Peters v. Brown. Mitchell v. Gillespie, 172 So.2d 819 (Fla. 1965); see also Hall v. Florida Board of Pharmacy, 177 So.2d 833 (Fla. 1965), holding that Mitchell v. Gillespie modified not only Peters v. Brown but also Dupuy v. State, 141 So.2d 825 (Fla. 1962), a similar case.

This Court's anticipation and eventual rejection of the due process defense has been reaffirmed following the formal emergence of the defense by the district courts of appeal

(except the First District in the decision below, of course), albeit that these courts have in some cases experienced regrettable difficulty in perceiving its distinction from the entrapment defense. 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 its 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 preselected 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, as explained previously, in no way dissolves their starkly contrasting results. Indeed, the dissenting judge in State v. Eshuk would have sustained the due process defense by relying upon Williamson -- just as the majority did below. In 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), a case in which an entrapment defense was not urged, the First

District itself, relying upon Hampton v. United States, rejected the due process defense of defendants who had purchased drugs from a government agent, and in so doing appeared to hold that this defense could never prevail in Florida. See also Owen v. State, 443 So.2d 173 (Fla. 1st DCA 1983), in which an informant's receipt of a flat fee for setting up a "reverse sting" operation was held proper. In State v. Brider, 386 So.2d 818 (Fla. 2nd DCA 1980), review denied, 392 So.2d 1372 (Fla. 1980), 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 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 is at odds with the State v. Brider decision sanctioning this practice. It is interesting to note that the State v. Brider court intimates that this Court, in dicta in the entrapment decision of State v. Dickinson, 370 So.2d 762 (Fla. 1979), may have rejected the validity of the due process defense in Florida on the basis of the United States Supreme Court's decision of Hampton v. United States. And in Sarno v. State, 424 So.2d 829 (Fla. 3rd DCA 1982), review denied, 434 So.2d 888 (Fla. 1983), 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 allowedto retain some of the profits he had realized from his sales. The prepaid

fee arrangement validated by the Third District in Sarno v. State is thus indistinguishable from that condemned below.

Substantively, the due process defense has thus been expressly repudiated by the United States Supreme Court, by the federal circuit courts, and the Florida district courts of appeal. This Court should take this opportunity to make explicit the implicit rejections of the defense contained in Mitchell v. Gillespie and State v. Dickinson.

B. Procedural Inapplicability Of the Due Process Defense

Even if the due process defense does substantively exist in this State--and apart from the incongruous decision below no court has held that it does--the State would strongly urge that it is procedurally improper for a trial court to grant such a motion prior to a trial in which the full factual context of the prosecution's challenged conduct could be adequately developed. Fla.R.Crim.P. 3.190(c)(4), pursuant to which the instant motion was filed, provides that a criminal defendant may move at any time to dismiss the charges against him on the ground that "[t]here are no material disputed facts and the undisputed facts do not establish a prima facie case of guilt" against him. Under Fla.R.Crim.P. 3.190(d), the State may traverse or demur to such a motion. If the State disputes material facts as alleged in the motion to dismiss, it should file a traverse, challenging the disputed facts with specificity. If the State does not dispute any material facts alleged in the motion to dismiss, but believes that the undisputed facts nonetheless establish a prima facie case of guilt against the

defendant, it may either file a demurrer or nothing at all, State v. Horne, 399 So.2d 49 (Fla. 3rd DCA 1981), State v. J.T.S., 373 So.2d 418 (Fla. 2d DCA 1979), see Haddock v. State, 192 So. 2d 802 (Fla. 1939), as it ultimately did here. In any case, the motion to dismiss may be granted only where the facts alleged, viewed in the light most favorable to the State, fail to establish a prima facie case of guilt against a defendant. State v. Davis, 243 So.2d 587 (Fla. 1971); State v. DeJerinett, 283 So.2d 126 (Fla.2d DCA 1973), cert. denied, 287 So.2d 689 (Fla. 1973); State v. Casper, 417 So.2d 263 (Fla. 1st DCA 1982). As noted, a defendant who argues a due process defense, such as the defendants here, admits the acts which led to the charges against him but asserts that the conduct of governmental agents in the case so outrages basic concepts of fairness that his conviction must be barred regardless of whether he was predisposed to commit the charged offenses.

How can a criminal defendant who admits the acts which led to the charges against him and argues that his predisposition to commit the charged offenses is irrelevant possibly prevail on a Rule 3.190(c)(4) argument that the undisputed material facts viewed in the light most favorable to the State fail to establish a prima facie case of his guilt? This is simply a procedural impossibility. The defense argued below that the dismissal in the instant case should not be so narrowly construed. This ignores that the trial court specifically relied upon Rule 3.190(c)(4) in dismissing the information, and that there is no viable Florida authority sustaining a trial court's decision to grant a defendant's motion to dismiss on due process grounds.[3]

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[3] In State v. Eshuk, the Third District Court reversed a (cont.)

The State would further assert that where, as here, a criminal defendant raises both a due process defense and an entrapment defense in a pretrial motion to dismiss, such motion must be summarily denied insofar as the defendant is inconsistently maintaining both that he did not possess the predispostion to commit the offenses and that the issue of his predispostion is irrelevant. In effect, the matter of the defendant's predisposition is disputed by the defendant himself! Criminal defendants should not be able to "walk both side of the street" in their pretrial pleadings any more than they should be able to judge-shop or present inconsistent defense at trial. See Ivory v. State, 173 So.2d 759 (Fla. 3rd DCA 1965), cert. dismissed, 183 So.2d 212 (Fla. 1965), holding that a defendant who denies he committed the acts which led to the criminal charges against him may not raise the defense of entrapment; see also Illinois v. Allen, 397 U.S. 337 (1970); Allen v. McCurry, 449 U.S. 90 (1980); Johnson v. Massey, 516 F.2d 1001 (5th Cir. 1975); United States v. Tasto, 586 F.2d 1068 (5th Cir. 1978), cert. denied, 440 U.S. 928 (1979); State v. Beamon, 298 So.2d 376 (Fla. 1974), cert. denied, 419 U.S. 1124 (1975); Sullivan v. State, 303 So.2d 632 (Fla. 1974), cert. denied, 428 U.S. 911 (1976); Jackson v. State, 359 So.2d 1190 (Fla. 1978); McPhee v State, 254 So.2d 406 (Fla. 1st DCA 1971); Barrett v. State, 266 So.2d 373 (Fla. 4th DCA 1972); Ellison v. State, 349 So.2d 731 (Fla. 3rd DCA 1977), cert. denied, 357 So.2d 185 (Fla. 1978); and Jones v. State, 362 So.2d

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lower court's dismissal of charges on due process grounds without analyzing the procedural propriety of the defendant's motion.

149 (Fla. 3rd DCA 1978), in which the courts have held in a variety of contexts that defendants should not profit from taking either incorrect or inconsistent positions during the course of a legal proceeding.

An additional procedural infirmity in any granting of a defendant's Rule 3.190(c)(4) motion to dismiss on a due process defense is that such a defense is, in truth, bottomed on the notion that the governmental involvement in the case has rendered its witnesses inherently incredible. The cases are legion which hold that evaluating the credibility of witnesses is for the trier of fact rather than the trial judge either before or during trial. See State v. West, 262 So.2d 457 (Fla. 4th DCA 1972); Tibbs v. State, 397 So.2d 1120 (Fla. 1981), affirmed, 457 U.S. 31 (1982). The State may reach the jury and the jury may convict a murder defendant solely upon the uncorroborated testimony of his accomplice, see Petersen v. State, 117 So. 227 (Fla. 1928), even though the accomplice may have been induced to testify against the defendant through promises of a lesser sentence or even total immunity. See Downs v. State, 386 So.2d 789 (Fla. 1980), cert. denied, 449 U.S. 976 (1980) and Barfield v. State, 402 So.2d 377 (Fla. 1980). Why then should the State not reach the jury of a drug defendant by virtue of the testimony of an informant whose testimony may have been induced through the possibility of financial reward? Certainly the promise of liberty is a greater inducement to false swearing then the promise of money. In either case the witness' credibility is rightfully for the jury. §90.601, Fla.Stat. (1981) provides that all witnesses are presumed competent to testify except as otherwise provided by statute. §90.603, Fla.Stat. (1981) provides that a witness may be disqualified from testifying only upon the basis of mental incompetence or inability. There is no statute which would prevent a paid informant from testifying in a criminal case, yet the informant in the instant case has effectively been

disqualified as a witness by the trial court's order. This informant's credibility or lack of credibility should be passed upon by a jury, and the respondents' credibility--whether or not they were predisposed to commit the acts they have admitted to committing, whether they have prior offenses-- should similarly be passed upon by a jury. Issues of witness credibility and a defendant's intent should be for the trier of fact, as stated in State v. J.T.S., Cummings v. State, 378 So.2d 879 (Fla. 1st DCA 1979), cert. denied, 386 So.2d 635 (Fla. 1980), and State v. Alford, 395 So.2d 201 (Fla. 4th DCA 1981), particularly so when, as noted, a defendant's pleadings are themselves inconsistent on the matter of his intent. As noted, many of Norwood Wilson's discussions with respondents have been preserved on tape. These tapes could not help but tell a jury an interesting story indeed about the relatively crediblity of the contending parties, cf United States v. Nixon, 418 U.S. 683 (1974), and would also reveal whether the State truly "manufactur[ed]... criminal activity" as the First District accused it of doing. If this Court were to find that the due process defense does substantively exist in this State and remands this case for trial, and if after receiving all the facts a jury were to convict these respondents, and the trial court nonetheless remains unshaken in his belief that prosecutorial misconduct occured, then and only then might the trial court be procedurally justified in directing a verdict on due process grounds, Fla. R.Crim.P. 3.380(c).

C. Only the Viability of the Due Process Defense is at Issue In this Litigation

Judging from their prior filings, the State anticipates that respondents will seek to confuse the instant litigation, which properly concerns only the viability of the due process defense, by raising several ancillary and irrelevant issues. The State could wait to ambush respondents on these issues in a reply brief, but would prefer to be straightforward and tackle these issues here.

First, probably citing to the axiom that the decision reached by a lower court should be upheld where that court reaches the right result regardless of its reasonsing, see e.g. Smith v. Phillips, 455 U.S. 209 (1982); City of Miami v. 8701 Collins Ave., 77 So.2d 428 (Fla. 1954); Cohen v. Mohawk, 137 So.2d 222 (Fla. 1963); and Savage v. State, 156 So.2d 566 (Fla. 1st DCA 1963), cert. denied, 158 So.2d 518 (Fla. 1963), respondents can be expected to argue, as they did below, that their Fla.R.Crim.P. 3.190(c)(4) motion to dismiss should have been granted on grounds of entrapment. The State would submit that such a contention would be absolutely ludicrous insofar as criminal defendants such as respondents who raise both a due process and an entrapment defense in a pretrial motion to dismiss are inconsistently disputing their own predispostion, as discussed, and should not be rewarded as a result.

Secondly, again probably citing to the axiom that the decision reached by a lower court should be upheld where that court reaches the right result regardless of its reasonsing, respondents can be expected to argue, as they did in the First

District, that dismissal of the conspiracy count would have been alternatively justified because that count had defectively alleged that State agent Wilson was alone to commit an act essential to proving the conspiracy. This argument, which is actually nothing more than a variation on respondents' previously rebuked themes of due process and entrapment, is based upon a misconception of this Court's holding in King v. State, 104 So.2d 730 (Fla.1957). In King v. State, the defendants were charged with conspiring with one another and with a state agent to commit gambling and bookmaking offenses. The evidence adduced at trial revealed indisputably that the substantive offenses to to which the conspiracy was directed were to be committed by the state agent alone. Based upon the "well settled (rule) that where one of two persons who conspire to do an illegal act is an officer acting in the discharge of his duty, the other person cannot be convicted on a charge of conspiracy", the court found that "there was no legal justification of conviction under the evidence." Id., 104 So.2d 730, 3732. Because the instant case involves a pretrial motion to dismiss which alleges that the individual respondents conspired to commit a substantive offense "with one another" as well as with a state agent, rather thean a post-trial motion for directed verdict where the evidence indisputably showed that the state agent alone was to commit the substantive offense, King v. State is inapplicable. The mere fact that the respondents were alleged to have conspired to purchase the cannabis they planned to sell from Wilson does not mean that Wilson was alone to commit an act essential to proving the conspiracy under State v. King. See State v.

Cristodero, 426 So.2d 977 (Fla. 4th DCA 1982), review denied sub. non, O'Donnell v. State, 426 So.2d 100 (Fla. 1983), and Priest v. State, ___So.2d___ (Fla. 1st DCA 1984), 9 F.L.W. 1142, reaching precisely this conclusion in virtually identical situations, see also McCain v. State, 390 So.2d 779 (Fla. 3rd DCA 1980), review denied, 399 So.2d 1144 (Fla. 1980), and State v. Brandon, 399 So.2d 459 (Fla. 2d DCA 1981).

Thirdly, once more probably citing to the axion that the decision reached by a lower court should be upheld where that court reaches the right result regardless of its reasoning, respondents can be expected to argue, as they did in the First District, that dismissal of the conspiracy count would have been alternatively justified because that count defectively failed to charge an offense cognizable under Florida law. The respondents put forth two arguments on this score, neither of which is easy to grasp and neither of which is correct. The respondents first seemingly argued that an information charging conspiracy to traffic in cannabis cannot stand in the absence of an accompanying allegation that the defendant was in actual or constructive possession of the drug. The respondents cited no specific case authority in support of this proposition, which is clearly incorrect. See United States v. Lee, 622 F.2d 787, 790 (5th Cir. 1980), reh.denied, 633 F.2d 582 (5th Cir. 1980), cert. denied, 451 U.S. 913 (1981), ("the determination that defendant did not have possession of the marijuana and did not aid or abet others does not foreclose proof of any element essential to a conviction for conspiracy to distribute marijuana"); United States v. Byers, 600 F.2d 1130 (5th Cir. 1979); United States v. Spradlen, 662

F.2d 724 (11th Cir. 1980); cf. State v. Barkett, 344 So.2d 868 (Fla. 2d DCA 1977). The respondents secondly argued that the information did not allege that these defendants were conspiring to either sell or to take possession of any amount of cannabis. This too is incorrect. Count II actually alleges that the defendants "did feloniously conspire . . . to traffic in cannabis, . . . in that (they) did . . . conspire with one another, and Norwood Lee Wilson to purchase from Norwood Lee Wilson a quantity of cannabis in excess of one hundred (100) pounds" (Vol.I, p. 1).

Fourthly, the respondents can be expected to argue, as they did below, that the issue of whether trial counsel for the State violated any provisions of the Code of Professional Responsibility is presented in this litigation. As noted, the trial court specifically found that the actions of trial counsel violated DR 7-109(c) and EC 7-28, which proscribe an attorney's payment of contingent fees to a witness, and pursuant to DR 1-102 and 103 referred the matter to the Grievance Committee of the Eighth Judicial Circuit. Although the trial court, in view of its understandable refusal to rely upon the procedure prescribed in Integration Rule 11:14, had no legal basis upon which to make any finding that trial counsel had in fact violated the Code of Professional Responsiblility, the State does not here quarrel with the decision to refer the matter to the Grievance Committee of the Eighth Judicial Circuit. However, once a disciplinary matter had been referred to a grievance committee, the courts lose their otherwise councurrent jurisdiction over the matter. Integration Rule 11:14(7). "Bar disciplinary proceedings

proceedings and judicial proceedings cannot be merged." Cunningham v. State, 349 So.2d 702, 706 (Fla. 4th DCA 1977), cert. denied, 362 So.2d 1052 (Fla. 1978). This matter is thus now within the sole province of the Grievance Committee of the Eighth Judicial Circuit. Even an ultimate adverse resolution to counsel there would not skewer the State's legal position here. Cf Frisbie v. Collins; cf also Schoonover v. Kanas, 543 P.2d 881 (Kan.1975), cert. denied, 424 U.S. 944 (1976), holding that even a defense counsel's direct contingent fee arrangement with his client, although clearly unethical, did not deprive the client of the effective assistance of counsel so as to justify federal habeas corpus relief. See United States v. Hastings; State v. Murray, 443 So.2d 955 (Fla. 1984).

The State, of course, does not wish its argument that whether the conduct of trail counsel violated the Code of Professional R sponsiblility is not for this Court's determination to be construed by the defense as a concession that this conduct was in fact unethical. As was noted by trial counsel, the "contract" here was between the informant and the Sheriff of Levy County, not the informant and the State Attorney's Office. Indeed, State Attorney do not disburse the proceeds of civil forfeitures under §932.704, Fla.Stat. (Supp.1982), and hence are without the means to formally enter into any "contingent fee" arrangement of the sort alleged by the defense to have occurred here.

* * *

As stated in its jurisdictional brief, the State knows from its contacts with numerous State Attorneys and the Florida Sheriff's Association that the decision under review is having a chilling effect on the administration of criminal justice

throughout this State. In State v. Eshuk, the Third District addressed one of the primary difficulties involved in the prosecution of drug cases as follows:

> The difficulty which those charged with law enforcement have in controlling local traffic in drugs is such that use of confidential informants as was done in this instance, if not essential to success, is of material assistance. Necessarily, the practice is general. Frequently such informants are persons who are on probation, or may be subject to pending criminal prosecutions, or under investigation of criminal offenses. Use of an informant in such status is not a violation of a defendant's constitutional rights, although it has led to a firm rule that when such an informant who has been so used testifies in a case he may be cross-examined regarding any such matters, as bearing on his bias or on his interest with respect to the testimony which he gives in the case.

347 So.2d 704, 707. This language is relevant here. The State is clearly entitled to have the credibility of its witness evaluated by a jury. This is why the nature of the State's challenge to the trial court's dismissal of the information has been and will continue to be wholly legal, while the nature of the respondents' defense of this dismissal has thus far beenand will probably continue to be, of necessity, wholly rhetorical. Such rhetorical assertions belong not before this Court in a brief but before a jury as closing argument. This Court should reverse the order of dismissal and give the respondents this opportunity.

CONCLUSION

WHEREFORE, the State respectfully submits the decision of the First District affirming the dismissal of the information by the trial court must be REVERSED and this casue REMANDED for trial.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Notice has been forwarded to James R. Murray, Assistant State Attorney, Post Office Box 1437, Gainesville, FL 32602; Robert G. Duval, 12230 Northwest 7th Avenue, Miami, FL 32602; James P. Ryan, Buckeye Building, 208 S.E. 6th Street, Ft. Lauderdale, FL 33301; Harvey Robbins, 1100 Northeast 125th St., Suite 109, North Miami, FL 33161; Gary W. Pollack, 224 Catalonia Avenue, Coral Gables, FL 33134; Peter Langley III, Post Office Box 124, Yankeetown, FL 32598; Harvie S. Duval, 1680 Northwest 135th Street, North Miami, FL 33161; Everett Jones, Florida Sheriff's Association P.O. Box 1437, Tallahassee, FL 32302, via U.S. Mail, this 24 day of July, 1984.

John W. Tiedemann
Assistant Attorney General