11-7-84

IN THE SUPREME COURT OF FLORIDA

CASE NO. 64,688

STATE OF FLORIDA,

Petitioner,

vs.

BOYCE E. GLOSSON, et al.,

Respondents.

BRIEF OF RESPONDENT, HAROLD T. SMITH IN REPLY TO PETITIONERS' AND AMICUS CURIAE BRIEF

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INDEX TO BRIEF

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THE STATEMENT OF THE CASE AND FACTS

The State filed a two count Amended Information charging Defendant Harold T. Smith ("Smith"), in Count I with possessing between one hundred and two thousand pounds of cannabis. Defendant Frances Lorraine Gonzalez ("Gonzalez"), was not charged in Count I of the Amended Information.

Both Smith and Gonzalez were charged in Count II of the Amended Information with conspiring with Norwood Lee Wilson ("Wilson"), a state agent, to purchase from Wilson a quantity of cannabis in excess of one hundred pounds (Vol. I, p. 3).

Smith and Gonzalez entered pleas of not guilty; filed the usual discovery Motions and then on September 7, 1983, filed a "Motion to Dismiss Count II of the Information", (Vol. I, p. 13).

The State filed on September 9, 1983, a Traverse to these Defendants' Motion to Dismiss Count II (Vol. I, p. 16).

Also, on September 7, 1983, Defendants Smith and Gonzalez filed their sworn "Motion to Dismiss Information for Prosecutorial Misconduct" (Vol. I, p. 26), and their sworn "Motion to Dismiss Information on the Grounds of Entrapment" (Vol. I, p. 31).

The State is incorrect in its Statements of Case and Facts by stating that the State traversed these Motions.

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The State did traverse these Defendants' "Motion to Dismiss Count II of the Information", but did not traverse either of these Defendants' Motions, directed toward prosecutorial misconduct and entrapment.

A hearing was held on all Motions on September 9, 1982. The Court thereafter, on September 27, 1982, filed its Order relating to the various Motions (Vol. I, p. 52) by which it denied these Defendants' Motion to Dismiss the Motion filed pursuant to Rule 3.190(c)4, Fla.R.Crim.P., (Defendants' Smith and Gonzalez' Motion to Dismiss Count II of the Information), as such had been traversed by the State.

The Court denied these Defendants' Motion to Dismiss for Prosecutorial Misconduct and Entrapment because it did not feel this to be a proper remedy without a complete evidentiary hearing (Vol. I, p. 52).

These Motions were not traversed by the State and the State has never denied any allegation contained in either sworn Motion.

A further hearing was held on the matter of these Motions on September 30, 1982 (Vol. VI, p. 1-95), at which time the State and defense agreed upon a stipulated set of facts which the Court could consider in ruling on the misconduct and entrapment Motions. The recital of the stipulated facts is contained in these Defendants' Sworn Motion to Dismiss, dated October 6, 1982 (Vol. I, p. 31).

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The Court thereafter entered its Order on October 7, 1982, dismissing both Counts of the Information with prejudice.

The First District Court of Appeals affirmed the trial Court's dismissal and this case is now before you on Certiorari.

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ISSUE

Defendants will reword the Issue as recited by the State in its Brief to read:

> DID THE FIRST DISTRICT COURT OF APPEALS ERR IN AFFIRMING THE TRIAL COURT'S DISMISSAL OF BOTH COUNTS OF THE INFORMATION AS TO DEFENDANTS SMITH AND GONZALEZ.

This question should be answered in the negative.

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ARGUMENT

The State would like to restrict this matter to the conduct of the State in being a party to a contingent fee contract permitting its principal witness to make cases from which he would be paid 10% of all civil forfeitures resulting from his testimony, as admitted by its Stipulation of Facts.

The first fact agreed to was that each Defendant had all asserted the defense of entrapment.

It is noted that the State in its Brief on page 3 recites the Stipulation of Facts agreed to by the parties before the trial Court and recites Fact No. 1 as follows:

> Fact Number One. The defense of entrapment [sic: due process] has been asserted by each of the defendants charged by information in that case.

The "[sic: due process]" is totally incorrect.

The parties did not stipulate that Fact Number One mistakenly stated defense of entrapment. The parties specifically agreed and the record is clear that each Defendant asserted the defense of entrapment.

The Motion of Smith and Gonzalez for dismissal on the grounds of entrapment included within it an adoption of their Motion to Dismiss for prosecutorial misconduct.

All reasons raised by the record may be considered by an Appellate Court in determining whether or not the Order of Dismissal should be affirmed.

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It is the Order of Dismissal being reviewed, not just the grounds or reasons cited therein. There are many Appellate decisions rendered by each of the District Courts and the Supreme Court of Florida which have affirmed the lower Court's Order on entirely different reasons than recited in the Order being appealed, affirmance by an Appellate Court is based on the Final Order being correct, considering all of the case, not just a reason cited in the Order.

There can be no doubt that the hiring by the State of an ex-convict who had served 11 years in the State penitentary, convicted of many offenses, including assualt, aggravated assault, breaking and entering, holding hostages, kidnapping, conspiracy and given a bad conduct discharge from the service (Vol. 1, p. 107; deposition of Norwood Wilpon, pp. 119-123), and at the time of hiring was on probation from a 1980 Federal Court narcotic conviction (Vol. 1, p. 107, deposition of Norwood Wilson, p. 9), and having him go out to sell the State's own marijuana to make cases and get forfeitures and agreeing to pay him a 10% contingent fee for all forfeitures obtained by his efforts was prosecutorial misconduct.

When the State calls a witness it vouches for the witnesses' integrity.

The State will not and cannot vouch for the integrity of its principal witness, Norwood Lee Wilson, but yet urges

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this Court to leave the matter of the State's principal witness integrity up to the jury.

Norwood Wilson was to be paid to secure evidence for making cases, not to investigate them. The Supreme Court of Florida, in the case of Peters v. Brown, et al., 55 So.2d 334 (Fla. 1951), had this to say in reversing a Judgment based on witnesses being hired to obtain evidence:

> We are confronted here with a case in equity where the doctrine of clean hands is the counterpart of entrapment in criminal procedure, but the rule in either case springs from decency, good faith, fairness and justice. Equity not only contemplates, it requires fair dealing in all who seek relief at its hands. He that hath committed iniquity shall not have equity, is a well known maxim of equity. All the evidence in this case was induced for pay and if given full face value, it leaves one in doubt whether defendant was doing the work of a dentist or a dental technician. In most cases due process and fair trial turn on procedure. I can think of nothing more disastrous to fair trial or more insolent to the safeguards with which it is protected, than a conviction secured solely on deliberately purchased evidence.

The State was more culpable than the State agency paying a fixed fee to its two witnesses in the Peters case, supra.

In this case, the State says, "Wilson, go out and sell marijuana and make cases; we don't care how you do it, but unless you sell marijuana, testify favorably and get convictions and obtain forfeitures, you aren't going to get paid; but if you are successful we will pay you 10% of all forfeitures".

In this case we have Norwood Wilson according to the untraversed Sworn Motion of Smith and Gonzalez (Vol. I, p.

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31), came to their home with Janet Moore, a friend of the Defendants, whom he had agreed to pay one half of his 10% to make cases, (Janet Moore's Statement, Vol. I, p. 99). Janet Moore became an uninvited house guest and proceeded to solicit Smith and Gonzalez to find buyers and offered to pay them for finding buyers. This offer of money alleged under oath by Smith and Gonzalez has never been denied by the State.

The State's officer, Billy Malphurs, testified that he heard Wilson asking Smith if he had tacked on to the price to cover his expenses and for him being the middle man (Vol. III, p. 131; deposition of Billy Malphurs, p. 14). Wilson, upon being paid for the marijuana by the buyers, gave Smith approximately $11,000.00 as his cut for finding the buyers (Vol. I, p. 107; deposition of Norwood Wilson, pp. 111-112).

There can be no doubt that Wilson and Janet Moore had offered Smith and Gonzalez a financial reward to obtain a buyer for the marijuana. Smith and Gonzalez by their Sworn Motion stated they had never been involved in trafficking of narcotics and had no intention of becoming involved, if the government agents had not induced them to become involved by promising to pay them for their services. The State has not alleged nor made any showing that either Smith or Gonzalez were predisposed to commit the offenses for which they are charged.

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Under the circumstances of the case and the deliberate violation of the Code of Professional Responsibility, DR 7-109(c) and EC 7-28, it is clear that the State was guilty of prosecutorial misconduct. The reasoning for the provisions of the Code prohibiting the payment of a contingent fee is to eliminate any financial motive of the witness to testify untruthfully. The State in this case gave every reason to encourage Wilson to testify untruthfully, particularly in defending his actions in regards to entrapment.

The offering of inducement by State agents to an accused is entrapment. See Liptak v. State, 256 So.2d 548 (Fla. 3d DCA 1972); Spencer v. State, 263 So.2d 283 (Fla. 1st DCA 1978). The offer of inducement of money to Smith and Gonzalez to find a buyer is uncontradicted and the State was guilty of entrapment.

Entrapment As A Matter Of Law

The State in its Brief advises the Court that it is not presenting the issue of entrapment as a matter of law to this Court.

It can readily be understood the State would rather ignore the issue raised in the Court below of entrapment of Defendants Smith and Gonzalez.

The State does not wish to admit that Defendants Smith and Gonzalez filed their Sworn Motion to Dismiss Information on the Grounds of Entrapment (Vol. I, p. 31), which included their Motion to Dismiss Information for

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Prosecutorial Misconduct (Vol. I, p. 26). The statements by Defendants in their Motions were sworn to be true. The State chose not to traverse or deny the truth of any statement contained therein. The Motions clearly establish that the conduct of Wilson and Moore was such as to be entrapment as a matter of law.

The State in its First District Brief advised the Court it had traversed Defendants' Motion, but failed to designate where in the record such traverse can be found. The State did traverse Smith's and Gonzalez's Motion to Dismiss Count II of the Information (Vol. I, p. 16), but did not traverse their entrapment or prosecutorial misconduct Motions.

In fact, the State has never traversed any of the other Defendants' Motions to Dismiss for Prosecutorial Misconduct.

The State in its First District Brief advised the Court that "it had alleged that Defendants were predisposed to commit the offenses for which they were charged". This statement is incorrect. The State has never filed any pleading or argued to the Court that either Smith or Gonzalez were predisposed to commit the crimes they were charged.

Smith and Gonzalez in their entrapment Motion stated they had never been involved in trafficking or narcotics and had no intention to become involved and would not have been involved if the government had not induced them to become involved by promising to pay them for their services (Vol. I, p. 31).

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The record is clear that Smith and Gonzalez were solicited to find buyers and offered money if a sale was made. In fact, Wilson and Janet Moore had in effect made Smith and Gonzalez their agents and agents of the State to find buyers to buy State marijuana. Wilson testified by deposition he paid Smith for finding the buyers (Vol. I, p. 197; deposition of Wilson, pp. 111-112).

The law is clear -- where the defense of entrapment is raised the State must show predisposition by the Defendant to commit the crime.

The First District Court of Appeals in the recent case of State v. Casper, 417 So.2d 263 (Fla. 1st DCA 1982), in affirming the trial Court's granting Defendant's Motion to Dismiss on grounds of entrapment as a matter of law said:

> Where defense of entrapment is raised, state must show predisposition by defendant to commit crime and moreover must make showing amounting to more than mere surmise and speculation that intent to commit crime originated in mind of accused and not policy.
>
> * * *
>
> Where there was no evidence of any prior conduct of defendant that would have shown predisposition to take money protruding from pocket of police decoy, a seemingly unconscious, drunken bum, where there was no evidence that defendant was engaging in criminal activity before he took money from decoy, and where defendant's acts demonstrated only that he succumbed to temptation, decoy simply provided opportunity to lure of bait, and thus defendant was entrapped as a matter of law.

Also see State v. Bride, 386 So.2d 818 (Fla. 2d DCA 1980); Smith v. State, 320 So.2d 420 (Fla. 2d DCA 1975); Spencer v. State, 263 So.2d 282 (Fla. st DCA 1972), recognizing that entrapment does exist as a matter of law.

There is no evidence in this record that either Smith or Gonzalez has ever been guilty of any conduct which would have shown predisposition.

The Court in Casper, supra, held that the State must demonstrate or allege facts to show a predisposition on the accused's part to commit the crime and absent such a showing or allegation the Appellate Court has no alterantive but to conclude the accused's entrapment defense has merit and prevents the conviction based on that defense.

Smith and Gonzalez in their entrapment Motion stated under oath that Wilson, with Janet Moore acting for him, originated the criminal intent or design and induced them to become involved in a crime which they had no intentions of becoming involved. The record shows Wilson was hired to obtain buyers and the statement of Janet Moore admits they went to Miami for the purpose of finding buyers. The State has never denied that Wilson and Moore did not originate the criminal intent and did not induce Smith and Gonzalez to become involved. There is nothing in the record to remotely indicate that Smith or Gonzalez would have ever been involved unless Wilson and Moore had not originated the intent and offered a financial reward.

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In the case of Depuy v. State, 141 So.2d 825 (Fla. 3d DCA 1962), the Court said:

> "When government inducement is employed to entrap someone not engaged in such course of activity, it has not detected crime but has merely helped to create it."

and further held:

> In view of the foregoing, it would seem that in case where the defense of entrapment is raised it is incumbent upon the state to make a showing amounting to more than mere surmise and speculation that the intent to commmit crime originated in the mind of the accused and not in the minds of the government.

The record in this case is clear that the intent originated with the State agents and such intent would support the defense of entrapment as a matter of law and justify the affirmance of the Order of Dismissal under appeal.

The uncontradicted evidence in this record of the State hiring an ex-con with an atrocious background, on a contingent fee basis based on forfeitures, to go out and induce members of the public to purchase State owned marijuana and to solicit persons to find buyers for a financial reward, of persons not predisposed to become involved, is entrapment as a matter of law and is a lack of decent standards resulting in a serious prosecutional misconduct by the State. Such conduct cannot be condoned as stated by this Court in Spencer, supra:

> In the exercise of governmental power, law enforcement officers should keep in mind that public confidence in the honorable administration of justice is an essential element of

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> our American system. Government detection methods must measure up to reasonably decent standards. Accardi v. United States, 257 F.2d 168.

The methods of the State in this case were far below reasonable decent standards and should not be condoned. Also see Hampton v. United States, 425 U.S. 484 (1975).

Trial Court Had Authority To Dismiss Count II Of The Information On Other Grounds

Count II of the Information allege a conspiracy of the Defendants with the State's agent, Norwood Lee Wilson, to purchase from him cannabis.

The State has stipulated that Wilson was an essential part in the alleged conspiracy. The Supreme Court of Florida in the case of King v. State, 104 So.2d 730 (Fla. 1958), said:

> We are cognizant of the fact that a punishable conspiracy may exist whether or not the crime intended to be accomplished by it was committed. But it is equally well settled 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.
>
> * * *
>
> And counsel for the State has cited no case, and our independent research has revealed none, in which a conspiracy conviction against two or more persons has been unheld where the proof showed that some act essential to the crime charged as the object of the conspiracy was performed by a government agent, acting in the line of duty. There are, however, decision striking down such convictions.
>
> * * *

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> We hold, therefore, with that appears to be the weight of, if not the only, authority, that where two or more persons conspire with another who is, unknown to them, a government agent acting in the line of duty, to commit an offense under an agreement and an intention that an essential ingredient of the offense is to be performed by, and only by, such government agent, such persons may not legally be convicted of a conspiracy.

Also see State v. Branden, 399 So.2d 459 (Fla. 2d DCA 1981), and Cruz v. State, 181 So.2d 20 (Fla. 3d DCA 1965).

The trial Court's Order of Dismissal can be sustained for the reason that Wilson was, on the face of the Information, required to perfrom an essential ingredient of the offense Defendants were charged which could only be performed by the sale of the cannabis. The State filed a traverse to Smith and Gonzalez's Motion to Dismiss Count II but the State cannot traverse its own Information, and change the facts alleged.

Count II Of The Information Wholly Fails To Charge An Offense Of The Florida Law

Count II charges these Defendants with conspiring to traffic in cannabis by agreeing to purchase cannabis from Norwood Lee Wilson, contrary to § 893.135 and § 777.04, Fla.Stat.

The Defendants are charged with conspiring to violate § 893.135(a), Fla.Stat., which reads:

> (a) Any person who knowingly sells, manufactures, delivers or brings into this state, or who is knowingly in actual or constructive possession of, in excess of 100 pounds of

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> cannabis is guilty of a felony of the first degree, which felony shall be known as "trafficking in cannabis."

This Statute makes it a violation to sell or have possession of cannabis but there is no violations for a person to purchase cannabis, he only violates the law when after purchasing takes actual or constructive possession. The information does not allege that these Defendants were conspiring to either sell or to take possession of any amount of cannabis.

The Supreme Court of Florida, in the early case of Brown v. State, 27 So. 869 (Fla. 1900), said:

> We are, however, of opinion that if the indictment wholly fails to state a criminal charge against the defendant, he may take advantage of that fatal defect primarily in the appellate court; and as the plaintiff in error has argued that the indictment is fatally defective, we shall proceed to consider the objection presented, with a view of determining whether the indictment wholly fails to state a case against him.

Section 684, 14 Fla.Jur.2d p. 286, reads:

> There are certain fundamental grounds on which the court may at anytime entertain a motion to dismiss. Defects or omissions in the accusatory instrument or in the mode of its finding, which are of so fundamental a character as to render the instrument wholly invalid, are not subject to waive by the defendant. Thus, an instrument that wholly fails to state an offense may be objected to for the first time on appeal, and, failure to file a pretrial motion to dismiss an indictment containing a defect going to the jurisdiction of the court to proceed to trial does not preclude review on appeal from conviction.

It is clear that Count II wholly fails to state a criminal charge against any Defendant and is one more reason

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for affirming the trial Court's Order of Dismissal.

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REPLY TO PETITIONERS' AND AMICUS CURIAE BRIEF

In reply to the Brief of the State and the Brief of Amicus Curiae of the Florida Sheriffs' Association, it is hard to understand their position when they are supposed to be the protectors of truth and virtue.

Both of these parties are well aware of the Code of Professional Responsibility (DR 7-109[c] and EC 7-28), which causes any person who violates the provision of these sections, by overpaying or paying a witness a contingent fee to testify is guilty of unethical conduct. An attorney who is found guilty of retaining witnesses on a contingent fee or overpaying a witness would be subject to disciplinary proceedings and possible disbarment. If a witness was presented at trial, by an attorney and it was revealed to the Court that he was being paid on a contingent basis, the Court would have every reason and right to reject him as a witness and discipline the person presenting him.

The State and the Florida Sheriffs' Bureau see nothing wrong with this procedure at all.

They request the Court to ignore the Code of Ethics which this Court has always demanded attorneys and Judges and Court officials to comply with. The Sheriffs and Prosecutors are Court officials and subject to the Code of Professional Responsibility.

The State cites many cases, too numerous for a busy attorney or Court to review. However, I see no discussion

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of any case where the added ingredient for paying a contingent fee to the State's principal witness to testify he was given state confiscated marijuana and told to go out and sell all he could to anyone he could entice to buy. The District Court of Appeals in its affirmance was absolutely correct in its opinion that Wilson was making cases, not investigating cases. This case is a new twist in investigation of crime.

All the previous cases made by confidential informants or undercover law enforcement officers were related to buying or seizing contraband. Now it is "we own the contraband, let's put it on the market and entice someone to buy from us-- then convict the buyer for buying our contraband." The criminal Statutes do not exempt officers from selling narcotics to the public. Condoning this method of law enforcement, particularly by the use of salesmen who are paid on a contingent basis guarantees entrapment by the salesman, who would be smart enough to deny entrapment to obtain a conviction. The State argues "let the jury determine our salesman's credibility problem; his credibility is not our problem, it's the jury's". The Petitioners and the Sheriff' Bureau both cite and argue that Williamson v. United States, 311 F.2d 441 (5th Cir. 1962) is not applicable.

The Sheriffs' Bureau Brief argues that when the Williamson Court held that "without some justification or explanation, we cannot sanction a contingent fee agreement

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to produce evidence against particular named Defendants" could not be applied to this case, as there appears to be nothing to indicate Wilson would only be paid if he secured the conviction of these particular Defendants. Who is the Sheriff's Bureau trying to kid? The record is clear that Wilson would get nothing for his work in this case unless he secured convictions of these Defendants.

The State and the Sheriffs' Bureau are asking this Court to condone their action in this case so that they can continue the hiring of many time convicted felons, at little or no expense, place narcotics in their hands, tell them to go out, without supervision and make cases against not only pre-selected Defendants, but anyone they can talk into buying their wares.

In this case, Wilson wasn't selling to Smith and Gonzalez but he engaged them to act as his agent to find him buyers he could sell to and agreed to pay and did pay Smith for finding Glosson, who found the buyers.

The State demands all professionals to live up to the Code of Professional Responsibility.

The State and the Sheriffs' Bureau is asking this Court to exempt all law enforcement officers from any responsibility under the Code of Professional Responsibility and permit them to violate these standards, all in the guise of law enforcement. Such conduct can only result in a complete loss of confidence by the public.

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The State and the Sheriffs' Bureau in so many words ask this Court to divorce them from any responsibility of vouching for the credibility of any person they present as a prosecuting witness.

If the Court rules that no prosecutor or law enforcement officer need be bothered with any concern of the integrity of its prosecuting witness and give them a free hand to present witnesses they cannot and will not vouch for, then the rights of the citizens of this State will be in great jeopardy.

The argument that it is not the duty of the prosecution to present credible witnesses but only to present witnesses and let the jury determine their credibility, is an argument not worthy of an ethical law enforcement officer.

If such actions are condoned such may result in all law enforcement officers being given extra pay on a contingent basis to make cases and obtain convictions. There can be little doubt that many law officers and/or so called confidential informants, being payed on a contingent basis for making cases and obtaining convictions, would exagerate their testimony or outright perjure themselves to make cases and obtain convictions in order to obtain their contingent fee.

If this Court condones and approves the use of contingent fee prosecution witnesses, it would have to

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condone defense attorneys having witnesses and pay a contingent fee if their testimony resulted in an acquital.

Approving contingent fee witnesses being paid for obtaining favorable verdicts or results in criminal or civil cases in any degree or for any reason will open a Pandora's box that will destroy the integrity of the judicial system.

If the Code of Ethics in this case is waived for the benefit of the State Attorney and law enforcement officers, this Court should waive all ethics requirements for all attorneys, judges, Court officials and other persons affected by the present Codes of Ethics.

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CONCLUSION

The First District Court should be affirmed and this Court if it accepts jurisdiction, should write a full Opinion relating to the ethics of the State or anyone else retaining witnesses and paying them a contingent fee based on the success of their testimony.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing was this 26th day of July, 1984, mailed to:

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